Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

JAMES S. and REBECCA DEATON,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for A Writ of Certiorari to
The United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A three-foot wide roadside drainage ditch runs alongside the property of James and Rebecca Deaton in rural Wicomico County, Maryland. The roadside ditch was built and is maintained by the county roads department and connects to a ditch system operated by a public association established under state law to address local drainage problems. The Deatons dug a ditch on their property and, in so doing, disturbed an area the United States Army Corps of Engineers considers a wetland. There is no showing that common dirt—the pollutant at issue—left the Deatons' property, flowed into the roadside ditch, or reached any truly navigable waters.

The questions presented are:

1. Are the roadside ditch and the wetland next to it "navigable waters" under the Clean Water Act?

2. Where activity in a wetland has not degraded either a nonnavigable roadside ditch next to the wetland or a downstream traditional navigable water, does Congress's commerce power over navigation allow federal regulation of that wetland or that roadside ditch?

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

The Petitioners are James S. and Rebecca Deaton, residents of Wicomico County, Maryland. The Respondent is the United States, acting through the United States Army Corps of Engineers.

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The opinions of the U.S. District Court for the District of Maryland are unreported. (27a-51a.) The Fourth Circuit's opinion is reported, 332 F.3d 698 (4th Cir. 2003). (1a-26a.)

JURISDICTION

The Court of Appeals entered judgment on June 12, 2003. (1a.) On August 11, 2003, it denied Petitioners' Request for Rehearing. (52a.) This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTION AND STATUTES

The Commerce Clause, U.S. Const. art. I, § 8, cl. 3: Congress has the power "[t]o regulate Commerce with foreign Nations, and among the several States...."

Pertinent sections of the Clean Water Act are reproduced in the Appendix. (53a-61a.)

STATEMENT

This case is about the outer reaches of federal environmental regulation. The Fourth Circuit held that a three-foot wide upland ditch along a two-lane country road outside Parsonsburg, Maryland—separated from the closest navigable-in-fact waterbody by over eight miles of other ditches, intermittent streams, dams, ponds, and culverts—is a "navigable water" under the Clean Water Act (CWA). Thus, when the Deatons dug a ditch through land the Corps considers a wetland near the roadside ditch, that activity was subject to the CWA's prohibitions, permitting requirements, and civil and criminal penalties.

The court below reached this conclusion although the Corps never claimed (or showed) that dirt disturbed by the Deatons' ditching left the property or reached the roadside ditch, much less downstream navigable waters. Rather,

the Fourth Circuit upheld federal jurisdiction on the unproven assumption that water in the roadside ditch "eventually flows" to, and sediment could "potentially" reach, navigable water. Such reasoning contravenes two decisions of this Court. *United States v. Riverside Bayview Homes,* 474 U.S. 121 (1985) (*Riverside*) and *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs,* 531 U.S. 151 (2001) (*SWANCC*), require that nonnavigable waters have a "significant nexus" to navigable waters to qualify as "waters of the United States." The Fourth Circuit's "eventually flows" test also conflicts with the Fifth Circuit, which rejected federal jurisdiction over an intermittent stream with only an attenuated connection to navigable waters. The Fifth Circuit effectuated the "significant nexus" principle by requiring a "close, direct, and proximate link" to navigable waters. *Rice v. Harken Exploration Co.*, 250 F. 3d 264, 272 (5th Cir. 2001) (*Rice*).

The issues presented by this case are profoundly important because they implicate "the significance of federalism in the whole structure of the Constitution." *See United States v. Lopez,* 514 U.S. 549, 575 (1995) (Kennedy, J., joined by O'Connor, J., concurring). The roadside ditch at issue is far removed from truly navigable waters. It is maintained by the Wicomico County roads department to handle rainwater draining from the road surface. It feeds into a series of other ditches constructed and maintained by the Beaverdam Public Drainage Association (PDA), an entity established by citizens under Maryland law to address local drainage problems. Under the Court of Appeals' reasoning, all of these local ditches and all wetlands "adjacent" to them will be regulated under the CWA because the ditches all eventually connect to "navigable waters." Such an astonishing expansion of federal authority cannot be sustained because it would "result in a significant impingement of the States' traditional and primary power over land and water use." *SWANCC,* 531 U.S. at 174.

Given the clear split in the circuits, the contradiction of this Court's decisions, the serious constitutional implications, and the importance of the issues to landowners and regulators alike, the Court should grant certiorari.

I. Statutory and Regulatory Framework.

In 1972, Congress passed the CWA, 33 U.S.C. §§ 1251-1387, to "restore and maintain the chemical, physical and biological integrity of the Nation's waters." *Id.* § 1251(a). Congress established a variety of funding, research, and regulatory programs to pursue that goal.[1] (*See* CWA table of contents, 53a-57a.)

As it designed this comprehensive pollution abatement scheme, Congress chose to "recognize, preserve, and protect the primary responsibilities of States...to plan the development and use...of land and water resources." 33 U.S.C. § 1251(b). Thus, the states establish quality standards and beneficial uses for their own waterbodies, control water quantity allocations and groundwater, and address nonpoint sources of pollution, such as sheetflow and agricultural runoff.[2]

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[1] *See, e.g.*, 33 U.S.C. Subch. I §§ 1251-74 (research and grant programs to study water pollution); *id.* Subch. II §§ 1281-1301 (grants for construction of publicly owned treatment works); *id.* Subch. III §§ 1311-1330 (establishment and enforcement of standards, including water quality standards and effluent limitations); *id.* Subch. IV §§ 1341-1346 (issuance of permits and licenses). *See also* programs aimed at specific waterbodies, *e.g.*, 33 U.S.C. §§ 1266 (Hudson River) and 1267 (Chesapeake Bay); and programs aimed at specific pollutants, *e.g.*, 33 U.S.C. §§ 1257 (mine water pollution) and 1265 (toxic pollutants).

[2] *See, e.g.*, 33 U.S.C. § 1251(g) (state authority to allocate water quantities within their jurisdiction); *id.* §§ 1311-1314 (state responsibility to develop water quality standards); *id.* § 1313(d)(1)(C) (state responsibility to establish "total maximum daily loads" for certain pollutants, or the maximum permissible level of pollutants allowed in designated impaired waters); *id.*

One element of Congress's multi-faceted, federal-state approach is section 301(a), which prohibits the "discharge of any pollutant by any person" unless permitted in the Act. 33 U.S.C. § 1311(a). "Discharge of a pollutant" means "any addition of any pollutant to *navigable waters* from any point source." *Id.* § 1362(12) (emphasis added).

Congress defined "navigable waters" to mean "the waters of the United States, including the territorial seas." *Id.* § 1362(7). Corps regulations (*see* 61a-62a) define "waters of the United States" to include, *inter alia*, traditional navigable waters, (33 C.F.R. § 328.3(a)(1)); "tributaries" of such waters (*id.* § (a)(5)); and "wetlands" that are "adjacent" to any of the above waters (*id.* § (a)(7)). While the regulation defines "adjacent" (*see* 63a), it does not define "tributaries" or suggest that ditches are "waters of the United States." In fact, the Corps has consistently disclaimed jurisdiction over upland ditches since the CWA's enactment.[3]

Moreover, the CWA states that a ditch falls within the definition of a "point source," which means that discharges of pollutants *from* ditches *into* navigable waters require a permit.[4] But the Act nowhere states that

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§ 1329 (state responsibility to develop nonpoint source management programs for navigable waters within the state).

[3] *See* 40 Fed. Reg. 31,320, 31,321 (July 25, 1975) (drainage and irrigation ditches "excluded" from definition of jurisdictional waters); 42 Fed. Reg. 37,122, 37,144 (July 19, 1977) ("manmade nontidal drainage and irrigation ditches excavated on dry land are not considered waters of the United States"); 45 Fed. Reg. 62,732, 62,747 (Sept. 19, 1980) (same); 48 Fed. Reg. 21,466, 21,474 (May 12, 1983) (same); 51 Fed. Reg. 41,206, 41,217 (Nov. 13, 1986) (Corps "generally" does not consider ditches excavated on dry land to be waters of the United States, but may claim otherwise "case-by-case").

[4] "Point source" means "any discernible, confined and discrete conveyance, including but not limited to any...ditch...." 33 U.S.C. § 1362(14). (*See* 60a-61a.)

ditches *themselves* (or any other point sources) are jurisdictional waters.

II. The Ditches of Wicomico County.

The roadside ditch that is the subject of this case (pictured at 78a) was probably built in the 1940s when Morris Leonard Road was still a dirt road. Today, the Wicomico County roads department maintains the ditch to collect and convey rainfall runoff that otherwise would stand on the road. The roadside ditch is approximately 2 to 3 feet wide as it passes in front of the Deatons' property. (72a.) Sometimes it carries water; other times it is dry. It contained 3 to 4 inches of water on October 22, 1996. (72a.) The closest navigable-in-fact body of water is the Wicomico River, which lies eight miles away over a course punctuated by five culverts, three ponds, and five dams.[5] (*See* 77a diagram.)

After fronting the Deatons' property, the roadside ditch connects to a culvert under Morris Leonard Road near the corner of the Deatons' property. At the culvert, the roadside ditch meets the drainage ditch dug by the Deatons across their property. The culvert connects to another ditch system constructed, maintained, and managed by the Beaverdam Public Drainage Association (PDA). PDAs are creatures of state law, formed at the grassroots level by:

> [A] petition signed by not less than one third of the landowners...in a watershed [and] filed with the clerk of the...county commissioners...describing ...the need for drainage for optimal crop production

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[5] The record (73a-74a, 77a) documents the obstructions between the roadside ditch and the Wicomico River. Five culverts, under: (1) Morris Leonard Road; (2) Maryland Route 376; (3) Maryland Route 346; (4) Walston Switch Road; (5) U.S. Route 50. Three ponds: (1) a "private pond" created by Hobbs Road Dam; (2) Parker Pond; (3) Schumaker Pond. Five dams: (1) Hobbs Road Dam; (2) North Schumaker Drive Dam; (3) Beaglin Park Drive Dam; (4) Beaverdam Drive Dam; (5) Snow Hill Road Dam.

> and that the public benefit...would be promoted by draining or ditching....

Md. Ann. Code Art. 25, § 53 (2001) (65a). PDAs are charged with the responsibility to:

> [L]ocate and establish ditches, drains, or canals, and to cause to be constructed,...widened, or deepened any ditch...or watercourse for the purpose of establishing and maintaining watershed drainage systems....

Id. § 52(a) (64a). State regulations require that PDA ditches be maintained to "assure the protection of natural resources and prevent water pollution by non-point source pollutants associated with agricultural drainage products." Md. Regs. Code tit. 15, § 20.01.01 (66a).

There are more than 100 active PDAs on the Eastern Shore of Maryland managing the drainage of more than 180,000 acres of land, primarily for agricultural purposes. In addition, there are "hundreds of miles of roadside ditches to facilitate transportation...[and] myriad farm ditches on private land...all of [which] functionally interact...with one ultimate purpose, *i.e.*, to move water quickly from the land." *See* Moving Water: A Report to the Chesapeake Bay Cabinet by the Public Drainage Task Force (October 2000) at 8, http://ces.washcoll.edu/ditching_report.pdf (last visited Nov. 7, 2003). The Maryland legislature has declared that "such drainage shall be considered a public benefit and conducive to the public health, convenience, and welfare." Md. Ann. Code Art. 25, § 52 (2001) (64a).

III. Enforcement Action Against the Deatons.

In 1989, the Deatons purchased 12.8 acres of land in rural Wicomico County, planning to build a home for themselves and four additional houses for sale to others. However, the county health department would not approve installation of sanitary drainfields on the site because of a high water table. To lower the water table,

the Deatons dug a drainage ditch through their property and, at the corner of their property, connected it to the roadside ditch, depositing some of the excavated dirt on adjacent land the Corps considers wetlands.

The Corps ordered the Deatons to stop work and initiated the enforcement action at issue. The Corps claimed that the Deatons needed a permit because their land contains a wetland and is "adjacent to Headwaters of Purdue Creek [sic], a tributary of the Wicomico River, which itself is a water of the United States...." (Compl. ¶ 23.) But as the case wore on, the Corps developed the theory that the roadside ditch is a "tributary" to which the Deatons' wetland is "adjacent," making them both "navigable waters" under the Corps's interpretation of the CWA.

IV. The Corps's Failed "Dye Test."

The Corps's failed effort to demonstrate a connection between the Deatons' property and the Wicomico River is documented in an affidavit describing a "dye test" conducted on May 17, 1996. (67a-69a.) At 8:18 a.m., the Corps placed tracing dye on the Deaton property at a location upgradient of the ditch the Deatons had dug. The affidavit reports that the Corps added dye "*as necessary to maintain a detectable level* for observations and photography," but does not indicate how often it was necessary to bolster the dye to "maintain a detectable level." The Corps next observed dye at the ditch that the Deatons had dug (9:47 a.m.), then at the culvert under Morris Leonard Road (10:24 a.m.) where the Deatons' ditch meets the roadside ditch, and finally at the nonnavigable confluence of Perdue Creek and Beaverdam Creek (4:16 p.m.). This final sighting was only two miles from the Deatons' property, but still six miles short of the Wicomico River. (*See* 77a.)

Most remarkably, the Corps *never placed dye in the roadside ditch itself*, which it claims is the jurisdictional linchpin for this entire case. The Corps only observed dye

in the ditch the Deatons had dug (which it has never claimed to be a tributary) and then at the end of the Deatons' ditch at the northwest corner of the property at the point where the Deatons' ditch meets the roadside ditch at the culvert under Morris Leonard Road.

There is no evidence in the record to show whether or how dye would have moved in the roadside ditch itself. Additionally, there is nothing in the record to suggest that dirt from the Deatons' ditch-digging ever migrated across the site to the roadside ditch or into the ditches of Wicomico County, or that such dirt reached and degraded the Wicomico River.

V. The Lower Court Decisions.

On cross-motions for summary judgment, the district court decided that "the surface water connection between the Deaton parcel and the Chesapeake Bay...makes any wetlands on the Deaton property contiguous with, and therefore adjacent to, waters of the United States." (31a.) Thus, the district court upheld CWA jurisdiction on the theory that the wetland is "adjacent" because of the attenuated path to distant navigable-in-fact waters.

The Court of Appeals had a different theory. Downplaying the specific roadside ditch at issue, the court started with a constitutional analysis and asked whether, categorically, nonnavigable tributaries to navigable waters could be regulated under the Commerce Clause. (10a.) Observing that Congress has the authority to regulate the channels of interstate commerce to keep them free from "immoral and injurious uses" (10a-11a), it reasoned that any pollutant in a nonnavigable tributary has the "*potential* to move downstream" and degrade navigable waters. (13a, emphasis added.) When the Deatons argued there was no showing that any pollutants ever left their property or reached the Wicomico River, the court cited *Wickard v. Fillburn,* 317 U.S. 111 (1942): Congress "may decide that the aggregate effect of all of the individual instances of discharge...justifies regulating each

of them.... [I]f Congress itself has the authority to make that decision, it may delegate it to the Corps." (13a.)

Having concluded that jurisdiction over "nonnavigable tributaries" is "well within" Congress's powers, the court below reasoned that "the Corps' interpretation does not invade an area of authority reserved to the states" (13a), nor did the Corps's position "invoke the outer limits of Congress's power or alter the federal-state framework...." (14a.) Thus, the court rejected the Deatons' argument that a "clear statement" by Congress was needed to sustain the agency's interpretation. (8a-9a.)

Turning lastly to the statute, the Court of Appeals held that Congress's definition of "navigable waters" as "waters of the United States" makes the Act "sufficiently ambiguous to constitute an implied delegation of authority to the Corps." (17a.) So it looked to the Corps's regulations, but found that the "regulation is ambiguous on the question of how far the coverage of tributaries extends." (19a.) The court therefore referred to the interpretation provided in the government's brief and concluded that under the regulation "jurisdiction extends to any branch of a tributary system that *eventually flows* into a navigable body of water." (19a, emphasis added.) "In short, the word 'tributaries' means what the Corps says it means." (20a.) Although previous regulations excluded ditches such as the roadside ditch at issue here (*see supra* n.3), and this Court cited those regulations approvingly in *SWANCC*, the Court of Appeals reasoned that the Corps's understanding had "evolved," and that therefore "deference is appropriate." (21a.) "The Act thus reaches to the roadside ditch and its adjacent wetlands." (22a.)

REASONS FOR GRANTING THE PETITION

I. The Fourth Circuit's Analysis of CWA Jurisdiction Contradicts This Court's Cases and Conflicts with the Fifth Circuit's Decision in *Rice*.

In *Riverside,* this Court upheld the Corps's authority to regulate wetlands "adjacent" to navigable-in-fact waters. It reserved the jurisdictional question regarding wetlands that are "not adjacent to bodies of open water"—the precise scenario presented here. 474 U.S. at 131 n.8. In *SWANCC,* the Court rejected the Corps's assertion of jurisdiction because "the text of the statute will not allow" coverage of ponds that "are *not* adjacent to open water." 531 U.S. at 168 (original emphasis). The *SWANCC* dissent read the majority opinion as "excising" from the CWA "intermittent rivers, streams, tributaries and perched wetlands that are not contiguous or adjacent to navigable waters." *Id.* at 189, 190 n.14 (Stevens, J., dissenting).

This Court's prior cases make clear that neither the roadside ditch nor the wetland next to it are "navigable waters" under the Act because neither is "adjacent to open water." Yet the Corps has claimed jurisdiction nonetheless, and the Court of Appeals has upheld that claim.

A. The Fourth Circuit Ignored the "Significant Nexus" Principles of *Riverside* and *SWANCC* and Substituted a "Some Connection" Test.

The *Riverside* Court upheld jurisdiction over "adjacent" wetlands because it discerned a congressional intent to regulate wetlands that are "inseparably bound up with the 'waters of the United States.'" 474 U.S. at 134. The Court emphasized that the wetlands in that case, described as "80 acres of low-lying marshy land," "actually abut[ted] on a navigable waterway," Black Creek. *Id.* at 124, 135. The *SWANCC* Court also stressed that the *Riverside* wetlands "actually abutted on a

navigable waterway," and further observed that its holding in *Riverside* "was based in large measure on Congress's unequivocal acquiescence to, and approval of, the Corps's regulations interpreting the CWA to cover wetlands adjacent to navigable waters." *SWANCC,* 531 U.S. at 167. *SWANCC* reinforced the need for an "inseparable" relationship between nonnavigable and navigable resources: "It was the *significant nexus* between the wetlands and 'navigable waters' that informed our reading of the CWA in *Riverside Bayview Homes.*" *Id.* (emphasis added). Accordingly, finding no inseparable relationship between the nonnavigable, isolated ponds at issue in *SWANCC* and a body of "open water," this Court held that the Corps's claim of jurisdiction "exceeds the authority granted to [the Corps] under Section 404(a) of the CWA." *Id.* at 174.

The Fourth Circuit lost sight of the reasoning in *Riverside* and *SWANCC.* Here, the ditch is far removed from navigable waters, with only a theoretical connection—certainly not an inseparable one. And, while the Court of Appeals acknowledged this Court's "significant nexus" principle, it nonetheless upheld jurisdiction over the roadside ditch (and the adjacent wetland on the Deaton property) based on the unsupported assumptions that the ditch is a tributary, and that "there [is] *a nexus* between a navigable waterway and its nonnavigable tributaries." (22a, emphasis added.) It further misinterpreted this Court's decisions as authorizing jurisdiction over "nonnavigable waters…with *some connection* to navigable ones." (17a, emphasis added.) Indeed, said the panel below, "jurisdiction extends to *any* branch of a tributary system that *eventually flows* into a navigable body of water." (20a, emphasis added.)

But this Court never premised CWA jurisdiction on "a" nexus, "some" connection, or "eventual flows." Rather, this Court's "significant nexus" principle gives effect to Congress's intent. On one hand, it gives the term "'navigable'…at least the import of showing what

Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made." *SWANCC,* 531 U.S. at 172. On the other, it recognizes Congress's intent "to regulate at least some waters that would not be deemed 'navigable' under the classical understanding of that term." *Id.* at 167 (quoting *Riverside,* 474 U.S. at 133). "*A* nexus," "*some* connection," and "*eventually* flows" are contrary to this careful balance.

B. The Circuits are in Conflict on the Meaning of This Court's "Significant Nexus" Principle.

The court below acknowledged that the Deatons and the Corps disagreed on "how much water flows through the ditch, and how consistent the flow is, but they agree on the ditch's course…a winding, thirty-two mile path to the Chesapeake Bay." (3a-4a.) For the Fourth Circuit, the ability to trace a course to navigable-in-fact waters was sufficient, by itself, to establish jurisdiction over the roadside ditch. The frequency and duration of water flow were irrelevant.

But facts like the amount, duration, and frequency of water flow *are* relevant to the "significant nexus" inquiry, as interpreted by the Fifth Circuit. In *Rice*, the Fifth Circuit applied *Riverside* and *SWANCC* to reject claims of jurisdiction over intermittent streams, *even though some connection to navigable waters existed:*

> There is no detailed or comprehensive description of any of these seasonal creeks available in the record. There is also very little evidence of the nature of Big Creek itself.... There is no detailed information about how often the creek runs, about how much water flows through it when it runs, or about whether the creek ever flows directly (above ground) into the Canadian River. In short, there is nothing in the record that could convince a reasonable trier of fact that either Big Creek or any

> of the unnamed other intermittent creeks on the ranch are *sufficiently linked* to an open body of navigable water....

250 F.3d at 270-71 (emphasis added). Thus, the Fifth Circuit sought a "close, direct and proximate link between [the defendant's discharges] and any resulting... contamination of a particular body of natural surface water...," not a mere hydrological connection. *Id.* at 272.

The Sixth Circuit has relied heavily on the Fourth Circuit's decision here to sustain an expansive interpretation of CWA jurisdiction. *See, e.g., United States v. Rapanos,* 339 F.3d 447, 454 (6th Cir. 2003) (possibility that *Rapanos* wetlands "could affect" navigable-in-fact waters miles away provides "ample nexus"). Indeed, *Deaton* has already spawned another opinion from the Fourth Circuit as well as a Seventh Circuit opinion, and both are currently the subject of petitions pending before this Court. We respectfully cross-reference the Petitions for Writ of Certiorari in *Rueth Development Co. v. United States,* No. 03-548, at 25-28 (Oct. 8, 2003), and *Newdunn Assocs. LLP v. U.S. Army Corps of Eng'rs,* No. 03-637, at 8-13 (Oct. 30, 2003), particularly for their descriptions of the confusion in the lower courts and the regulatory agencies. Certiorari is warranted to reconcile these conflicting interpretations of the CWA's scope.

C. The Fourth Circuit Ignored This Court's Clear Holding that Wetlands Must be Adjacent to "*Open*" Water to Support CWA Jurisdiction.

Even if the roadside ditch were itself a CWA "navigable water," the Corps nonetheless exceeded its authority by regulating the Deatons' *wetland.* The wetlands in *Riverside* were properly regulated as "adjacent" because they actually abutted Black Creek, a navigable waterway. 474 U.S. at 135. *SWANCC,* explaining *Riverside*, stated that "the text of the statute will not allow" the extension of jurisdiction to waters

"that are *not* adjacent to open water." 531 U.S. at 168. In *Rice*, the Fifth Circuit, in contrast to the court below, followed *SWANCC* when it held that "a body of water is subject to regulation under the CWA if [it] is actually navigable or is adjacent to an open body of navigable water." 250 F.3d 264, 268.

The term "open water" is used throughout Supreme Court jurisprudence as synonymous with traditional navigable water.[6] Like the sand and gravel pits in *SWANCC,* the wetland on the Deaton parcel is "*not* adjacent to open water." *SWANCC,* 531 U.S. at 168. Neither is the ditch. Therefore, neither should be deemed "navigable waters."

II. The Fourth Circuit's Constitutional Analysis is Inconsistent with this Court's Precedents and Conflicts with Other Circuits.

A. The "Commerce Power Over Navigation" Cannot Encompass Regulation of this Roadside Ditch, Much Less the Wetland Alleged To Be Adjacent to It.

> "[T]he powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written."

Marbury v. Madison, 5 U.S. 137, 176 (1803) (Marshall, C.J.). In *SWANCC,* this Court identified the constitutional authority for the CWA as Congress's "commerce power over navigation," 531 U.S. at 165 n.2, and explained that Congress intended to exercise "its traditional jurisdiction

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[6] *See, e.g., Kaiser Aetna v. United States*, 444 U.S. 164, 190 (1979) (referring to Maunalua Bay, a truly navigable water, as an "open water") (Blackmun, J., dissenting); *Kotch v. Board of River Port Pilot Comm'rs*, 330 U.S. 552, 558 (1947) (explaining that pilots take ships from "open waters" to local waters); *United States v. Oregon*, 295 U.S. 1, 22 (1935) (using "open water" to describe the area where boats could be used).

over waters that were or had been navigable in fact or which could reasonably be so made." *Id.* at 172.[7] The Fourth Circuit agreed that the CWA's constitutional source is Congress's jurisdiction over navigable waters. (10a.)

Congress's power over navigable-in-fact waters is "plenary," "as broad as the needs of commerce," and not "limited to the control of navigation." *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 426 (1941) (Federal Power Commission may require license for dam construction on navigable New River for purposes unrelated to navigation, such as power development and resource planning.) However, federal authority over activities on nonnavigable waters is not as broad. Under the commerce power, federal regulation of activities on nonnavigable waters has been sustained, but only upon findings or evidence demonstrating that the activity at issue will actually impact navigable waters. For example, *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690 (1899), confirms Congress's power to prevent a state's appropriation of water, "even at a place above the limits of navigability,...[that] diminish[es] the volume of waters [flowing into] a navigable stream, to such an extent as to destroy its navigability." *Id.* at 709. In reaching this conclusion, the Court examined international treaties, "affidavits and other evidence" and determined that the state's uses would "substantially interfere[] with the navigable capacity" of the Rio Grande River and therefore could be enjoined pursuant to the Rivers and Harbors Act of 1890. *Id.* at 708-09. *Oklahoma ex rel. Phillips v. Guy*

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[7] *The Daniel Ball*, 77 U.S. 557, 563 (1870) (mem.), provides the classic definition of "navigable waters" as waters that "are used, or susceptible of being used, in their ordinary condition, as highways for commerce...." Down the years, this definition has been clarified to include waters that are now, have been in the past, or may with reasonable improvements, be used by vessels in interstate or foreign commerce. *See United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 407-09 (1940); *Econ. Light & Power Co. v. United States*, 256 U.S. 113, 123 (1921).

F. Atkinson Co., 313 U.S. 508 (1941), is similar. After considering an extensive legislative and engineering record documenting the need to control water flows in tributaries to protect the Mississippi River from flooding, the Court upheld congressional authority over the river's nonnavigable stretches. *Id.* at 516-24. It found the effects on the navigable river "tangible." *Id.* at 524.

Of course, neither the roadside ditch nor the Deatons' wetland is navigable-in-fact, so Congress does not have plenary power to regulate all activities on them. Under cases like *Rio Grande Dam* and *Oklahoma*, to render the roadside ditch and the wetland next to it "navigable waters," there must be some evidence that doing so is necessary to prevent the Deatons' actions from causing a tangible, actual impact to navigable waters (*i.e.*, the Wicomico River.) That evidence does not exist. Nothing in the record suggests that dirt left the Deatons' property, flowed through the roadside ditch, or reached, much less degraded, downstream navigable waters. The dye test (*supra* at 7-8) proves only that the Corps stopped observing dye six miles short of the Wicomico River.

In no case has this Court *presumed* an impact to navigable waters as justification under the Commerce Clause to regulate activities on nonnavigable waters, much less to federalize the waters themselves. But the Court of Appeals did just that. It reasoned that "any pollutant" in nonnavigable waters "has the *potential* to move downstream and degrade the quality of the navigable waters themselves." (13a.) There are no legislative findings, administrative records, or factual evidence here to support the lower court's assumption that the Deatons' ditch-digging caused dirt to reach the remote, low-volume, intermittent roadside ditch, much less move downstream to damage the Wicomico. The commerce power over navigation cannot stretch so far as to encompass such conjectured, hypothetical impacts.

B. The Fourth Circuit Misapplied This Court's "Immoral or Injurious Use" Cases.

In upholding the Corps's action, the Court of Appeals cited three areas Congress may regulate under the Commerce Clause: (1) use of the channels of interstate commerce; (2) instrumentalities of interstate commerce, including persons or things in interstate commerce; and (3) activities having a "substantial effect" on interstate commerce. *United States v. Lopez,* 514 U.S. 549, 558-59 (1995). These categories are well established. *See Pierce County v. Guillen,* 537 U.S. 129, 147 (2003); *United States v. Morrison,* 529 U.S. 598, 609 (2000). The Fourth Circuit described them as "three distinct spheres." (10a.) Indeed, they are analytically distinct, *United States v. Robertson,* 514 U.S. 669, 670-71 (1995) (*per curiam*), and each "sphere" has its own doctrinal integrity, unique mode of analysis, and specific body of case law. As one judge has stated, it is improper to "'mix and match' attributes of the various categories" from *Lopez* to expand congressional authority. *United States v. Faasse,* 265 F.3d 475, 499 n.2 (6th Cir. 2001) (Batchelder, J., dissenting). Yet that is precisely what the Court of Appeals did here.

After citing *Lopez*'s three categories, the Fourth Circuit stated that Congress's "power over navigable waters is an aspect of the authority to regulate the channels of interstate commerce." (10a.) It held that Congress's channels power, "unlike its power to regulate activities with a substantial relation to interstate commerce, reaches beyond the regulation of activities that are purely economic in nature" (10a), and that Congress may use its power over commercial channels to "prevent the use of navigable waters for injurious purposes." (12a.) The Fourth Circuit relied on cases such as *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964), in which this Court cited Congress's power to regulate travel of persons and property in interstate commerce to uphold the Civil Rights Act of 1964, which prohibits racial

discrimination in "any inn, hotel, or motel" if its operations "affect commerce." *Id.* at 247. Likewise, *Caminetti v. United States,* 242 U.S. 470 (1917), upheld the Mann Act, which prohibited the transfer of women across state lines for immoral purposes. And, in *United States v. Darby,* 312 U.S. 100 (1941), the Court found Congress had the authority to exclude from interstate channels certain goods manufactured in violation of the wage and hour restrictions of the Fair Labor Standards Act. Such goods may be "injurious to the public health, morals or welfare...." *Id.* at 114.

The Fourth Circuit turned to this line of cases on its own (the Corps never raised the "immoral or injurious use" argument), but they are wholly inapposite. None of the cited decisions support the proposition that Congress may regulate activities on a nonchannel simply because they may potentially result in injurious uses of *the* channel. The cited cases all involve actual interstate activity on, and uses of, a commercial channel *itself.*[8]

The Deatons dug a short ditch on their own property. No one has suggested that their property, or the roadside ditch alongside it, is a channel of commerce. To the extent the Fourth Circuit found injury in the "potential" for sediment to "move downstream" and degrade navigable waters (13a), it ignored the evidence in this case. There is no showing that sediment even left the Deaton property, much less degraded navigable waters.

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[8] The Court of Appeals found that the Corps's regulation over "tributaries" *generally* (33 C.F.R. § 328.3(a)(5)) (*see* 62a) "fits comfortably within Congress's authority to regulate navigable waters" (8a), and that "Congress has the authority to regulate discharges in nonnavigable tributaries" *categorically* to protect navigable waters. (13a.) But the Deatons never asked the Fourth Circuit to assess the facial validity of the Corps's (a)(5) regulation; the Deatons do not believe the roadside ditch is a tributary at all. Regardless, it would stretch this Court's jurisprudence to conclude that the roadside ditch at issue "fits comfortably" within the Commerce Clause, but the lower court dodged that question with its shift in focus.

This Court has warned against "pil[ing] inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States." *Lopez,* 514 U.S. at 567. *See also Morrison,* 529 U.S. at 615 & n.6 (rejecting the use of a limitless "but-for causal chain" of potential impacts on commerce).

C. The Fourth Circuit Created Conflict When it Imported an "Aggregate Effects" Test Into its "Channels of Commerce" Analysis.

Having treated the activity subject to regulation here as *noneconomic* in order to cite the "immoral and injurious use" cases, the court below then relied on aggregation principles that are applicable only to intrastate *economic* activities to overcome the concededly trivial nature of the Deatons' actions. It stated, "Congress [or the Corps, using its delegated authority] *may...decide* that the aggregate effect of all of the individual instances of discharge, like the discharge by the Deatons, justifies regulating each of them." (13a, citing *Wickard v. Fillburn,* 317 U.S. 111 (1942).) The Court of Appeals pointed to no congressional or administrative decision to aggregate such activities, nor did it explain how aggregation could be applied to noneconomic activities in a channels analysis.

By importing the "aggregate effect" principle into its channels of commerce analysis, the court below strayed markedly from established constitutional law and placed itself in sharp conflict with other Circuits. The aggregation principle *is strictly a Lopez sphere 3 concept. It is misplaced in a sphere 1 "channels" analysis. See Morrison*, 529 U.S. at 611 n.4 ("[I]n every case where we have sustained federal regulation under the aggregation principle in *Wickard v. Filburn*, the regulated activity was of an apparent commercial character" (citations omitted)). *Lopez*'s three spheres are "analytically distinct," and the "'affecting commerce' test was developed in our

jurisprudence to define the extent of Congress's power over purely *intra*state commercial activities that nonetheless have substantial *inter*state effects." *Robertson,* 514 U.S. at 670-71 (original emphasis). Thus, in *Robertson*, which involved federal regulation of a gold mine that was "engaged in interstate commerce," it was not necessary to consider whether the activity "substantially affected" interstate commerce. *Id.* at 673. As Professor Tribe writes, *Robertson* confirms that "the 'substantial effect' requirement applies only to the third category; the first two categories, *by definition,* substantially affect—because they are *components* of—interstate commerce." Laurence Tribe, American Constitutional Law Vol. I, § 5-5 at 826-27 (3d ed. 2000) (original emphasis).

Consequently, the cases that have used the aggregation principle are all *Lopez* sphere 3 cases, whereas courts employing a channels or instrumentalities analysis have uniformly found aggregation and substantial effects principles inapposite.[9] The Fourth Circuit engendered conflict with all of them when it mobilized the aggregate effects principle in service of its already expansive channels analysis.

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[9] *United States v. Al-Zubaidy*, 283 F.3d 804, 811 (6th Cir. 2002) ("[w]here Congress seeks to regulate the channels or instrumentalities of interstate commerce, it is not bound by the 'substantial effects' test"); *United States v. Lankford*, 196 F.3d 563, 572 (5th Cir. 1999) (in channels analysis, "we need not address whether [an activity] 'substantially affects' interstate commerce, as required under *Lopez*'s third prong"); *United States v. DiSanto*, 86 F.3d 1238, 1245 (1st Cir. 1996) (*Lopez*'s spheres are "analytically distinct," citing *Robertson*); *United States v. Pappadopoulos*, 64 F.3d 522, 526 (9th Cir. 1995) (same); *United States v. Nichols*, 928 F. Supp. 302 (S.D.N.Y. 1996) ("[w]hen assessing regulations in [the channels of commerce] category, there is no 'substantially affects element'"), *aff'd by unpub. op.*, 113 F.3d 1230, 1997 WL 280064 (2d Cir. 1997); *United States v. Goldberg*, 928 F. Supp. 89, 96 (D. Mass. 1996) (*Lopez* spheres 1 and 2 "are not subject to the 'substantially affect' test").

Picking and choosing among *Lopez*'s categories, as if *Lopez* were a constitutional buffet, disserves the Commerce Clause. Certiorari should be granted to rectify the conflict that the Fourth Circuit has created.

D. Federal Regulation Over This Roadside Ditch Would Obliterate the Distinction Between "What is National and What is Local."

The Commerce Clause is not a federal police power. It is "subject to outer limits." *Lopez,* 514 U.S. at 556. In *NLRB v. Jones & Laughlin Steel Corp.,* 301 U.S. 1 (1939), this Court warned that the commerce power "must be considered in the light of our dual system of government and may not...embrace effects on interstate commerce [that]...would effectually obliterate the distinction between what is national and what is local...." *Id.* at 37. *See also United States v. Morrison,* 529 U.S. 598, 617 (2000) ("[t]he Constitution requires a distinction between what is truly national and what is truly local").

Maintaining separate realms of federal and state authority is part of the Framers' vision to safeguard our personal liberties. Justice Kennedy, joined by Justice O'Connor, wrote:

> [I]t was the insight of the Framers that freedom was enhanced by the creation of two governments.... "Hence, a double security arises to the rights of our people. The different governments will control each other, at the same time that each will be controlled by itself."

Lopez, 514 U.S. at 576 (1995) (Kennedy, J., concurring) (quoting The Federalist No. 51, at 323 (C. Rossiter ed. 1961) (J. Madison)). *See also Gregory v. Ashcroft,* 501 U.S. 452, 458 (1991) ("a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front").

In the CWA, Congress left it to the states to develop local programs, including land use requirements, to

control nonpoint sources of pollution such as stormwater runoff. *See, e.g.*, 33 U.S.C. § 1288(b)(2)(F); *id.* § 1313(f); *id.* § 1314(f); *id.* § 1329. Here, the State of Maryland established its PDA program to control local drainage from nonpoint sources, and Wicomico County built the roadside ditch to collect stormwater runoff and prevent flooding on the Morris Leonard Road. *See supra* at 5-6 (discussion of Maryland PDA system). Thus, on one hand, ditches have been created by state bodies to control nonpoint source runoff as allowed by the CWA, but, on the other hand, the Corps would regulate those ditches as "navigable waters" and subject them to federal permitting requirements. Moreover, Maryland's General Assembly has enacted its own comprehensive program to protect nontidal wetlands. *See* Md. Code Ann., Environment § 5-902(a) (1996) ("The General Assembly finds that nontidal wetlands play important roles in the preservation and protection of the Chesapeake Bay and other waters of the State").

"[C]itizens must have some means of knowing which of the two governments to hold accountable for the failure to perform a given function. 'Federalism serves to assign political responsibility, not to obscure it.'" *Lopez,* 514 U.S. at 576 (Kennedy, J., concurring) (citing *FTC v. Ticor Title Ins. Co.,* 504 U.S. 621, 636 (1992)). The Corps's federalization of the roadside ditch and the Deatons' wetland contravenes these principles. Which level of government now controls the PDA ditch system? To whom should citizens look to address local drainage concerns? Certiorari should be granted to clarify the distinctions between "what is national and what is local."

III. The Fourth Circuit Failed to Apply the "Clear Statement" Rule and Incorrectly Deferred to the Corps's Unreasonable Interpretation.

A. The Fourth Circuit Violated the Clear Statement Rule.

The "most important" rule of statutory construction "is the clear statement rule." *See* I Tribe § 5-9 at 853. Where an agency interprets a statute in a manner that "invokes the outer limits of Congress's power" or "overrides…[the] usual constitutional balance of federal and state powers," this Court "expect[s] a clear indication that Congress intended that result." *SWANCC,* 531 U.S. at 172-73; *Gregory v. Ashcroft,* 501 U.S. 452, 460 (1991) (citing *Atascadero State Hosp. v. Scanlon,* 473 U.S. 234, 242-43 (1985)). For example, in the Fourth Circuit's Commerce Clause analysis (*supra* at 19-21), the only case cited to support aggregation is *Wickard v. Fillburn* (*see* 13a), "perhaps the most far reaching example of Commerce Clause authority over intrastate activity…." *Lopez,* 514 U.S. at 560. On this point alone, the Court of Appeals skirted the Constitution's outer bounds. It should have searched for a clear statement that the CWA covers this roadside ditch.

Had it looked, it would have come up empty-handed. *SWANCC* found "nothing approaching a clear statement from Congress that it intended § 404(a) to reach an abandoned sand and gravel pit…." *Id.* Likewise, there is no clear statement that the CWA's scope includes nonnavigable ditches that could "potentially" impact or "eventually flow" into navigable waters. In fact, ditches are specifically included in the Act's definition of "point source" (*supra* n.4). *See Raygor v. Regents of the Univ. of Minn.*, 534 U.S. 533, 546 (2002) ("look[] for a clear statement of what the rule *includes,* not…what it *excludes*") (original emphasis).

Moreover, the clear statement requirement is "heightened" where an *agency* interprets a statute in a

manner that would "alter[] the federal-state framework by permitting federal encroachment upon a traditional state power." *SWANCC*, 531 U.S. at 173. The Court of Appeals held that the Corps's determination that the ditch is a "water of the United States" is "well within" Congress's power to protect navigable waters. (13a.) Thus, the Corps's interpretation did "not alter the federal-state framework" (14a), and the clear statement rule was not triggered. But the Fourth Circuit missed the point. The question is not whether Congress *has* the power to categorically regulate nonnavigable tributaries to protect navigable waters, but whether the *exercise* of that federal power in a case such as this trenches on state authority. Here, the Corps has not merely required a permit for the discharge of a pollutant that flows from a point source (*i.e.*, a nonnavigable ditch) into navigable water. It has transformed the roadside ditch *itself* into a "navigable water," thereby subjecting any activity that impacts the ditch to all CWA requirements and penalties.

This result undoubtedly intrudes on traditional state functions and thus triggers the clear statement requirement. The regulation of land and water use within a state's borders is a traditional state function. *See SWANCC,* 531 U.S. at 174 (citing *Hess v. Port Authority Trans-Hudson Corporation,* 513 U.S. 30, 44 (1994)). The roadside ditch at issue is maintained by the county roads department to collect rainfall runoff that would otherwise collect on the road. It feeds into a series of ditches constructed and maintained by the Beaverdam PDA, which is one of over 100 PDAs on Maryland's Eastern Shore. PDAs are county-level political entities established under Maryland law. The drainage accomplished through these ditch systems is considered under Maryland statute a "public benefit...conducive to the public health, convenience and welfare." (*See* 64a.)

Deeming the ditch a federal "navigable water" changes everything. What was once a ditch subject to local control is now a "water of the United States," subjecting a plethora of local activities to federal

regulatory requirements that trump local drainage concerns. If this ditch is a "navigable water," so are most ditches. Water runs downhill and "eventually flows" to navigable waters. Ditches are everywhere. U.S. Department of Transportation regulations require that any federally funded primary road must be "designed...and maintained to have adequate drainage, cross drains, and ditch relief drains." 30 C.F.R. § 816.151(d)(1). Similar requirements are commonplace under state and local law. Thus, many roads have ditches on both sides, and some even have additional ditches in the median strip. With more than 3.9 million miles of roads in this country, this adds up to a lot of ditches.[10]

Nothing in the CWA states that the term "navigable waters" reaches so far. As this Court emphasized in *SWANCC*, Congress preserved the "federal-state balance" when it "chose to 'recognize, preserve and protect the primary responsibilities and rights of States to...plan the development and use...of land and water resources...'" within their borders. 531 U.S. at 166-67 (citing 33 U.S.C. § 1251(b)). Tellingly, the Fourth Circuit did not cite this provision of the Act anywhere in its opinion.

B. The Fourth Circuit Erred in Reaching the Point of Deference to the Corps's Interpretation.

Failing to comply with the clear statement rule, the Court of Appeals erroneously deferred to the Corps's statutory interpretation. (*See* 21a-22a.) The two-step analysis for judicial review of agency action is axiomatic. First, if Congress has spoken to the issue, "that is the end of the matter," and a court must give effect to clearly expressed legislative intent. *Chevron USA, Inc. v. Natural Resources Defense Council,* 467 U.S. 837, 842 (1984). If,

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[10] *See* U.S. Dep't of Transp., Federal Highway Admin., Highway Statistics 2001 § V, Roadway Extent, Characteristics and Performance, Table HM-10, at http://www.fhwa.dot.gov/ohim/hs01/hm10.htm (last visited Nov. 6, 2003).

however, the statute is silent or ambiguous on the question at hand, then under step 2 a court must defer to the agency's statutory interpretation as long as it is reasonable. *Id.* at 843. Where the clear statement rule is triggered—as it should have been here—"explicit *congressional* authorization" is required. A court may not find that clear statement by deferring to an agency's interpretation.[11]

Indeed, administrative deference requires ambiguity in the statute. The *SWANCC* Court stopped at step 1 under *Chevron* and did not defer to the Corps. It decided that "the text [of the CWA] will not allow" the Corps's claim of jurisdiction over "ponds that are *not* adjacent to open water." *SWANCC*, 531 U.S. at 168 (original emphasis). The Court found "§ 404(a) to be clear" that nonnavigable isolated ponds were outside the CWA's scope, because "Congress had in mind as its authority for enacting the CWA…its traditional jurisdiction over" navigable waters. *Id.* at 172. The Corps faced "a difficult task in overcoming the plain text and import" of the CWA, so it received no deference. *Id.* at 170. The Fourth Circuit contradicted *SWANCC* when it said the CWA is ambiguous and then when it deferred to the Corps. It thought it could "not tell from the Act the extent to which nonnavigable waters are covered" (17a), but *SWANCC* already identified the CWA's jurisdictional polestar: namely, Congress's traditional authority over navigable waters, which would exclude regulation of this roadside ditch.

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[11] Cass R. Sunstein, *Law and Administration After Chevron*, 90 Colum. L. Rev. 2017, 2113 (1990) (original emphasis). *See also John v. United States*, 247 F.3d 1032, 1046 (9th Cir. 2001) (Kozinski, J., dissenting) ("*Chevron* deference has never been very persuasive…" where a clear statement is required; "*Chevron* and the clear statement rule are therefore at loggerheads…").

C. The Corps Was Not Entitled to Deference in Any Event.

Congress's intent to preserve the federal-state balance in the CWA, and to exercise its traditional authority over navigable waters, makes clear that the CWA does not reach this roadside ditch. But even if there were no need to invoke the clear statement rule, *and* the statute were ambiguous, the Corps's position would still not be owed deference. Affording deference to an agency depends on "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *United States v. Mead Corp.*, 533 U.S. 218, 228 (2001) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)). Deference is at its lowest when, as here, the agency's position is "advanced for the first time in a litigation brief." *Id.* (citing *Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204, 212-213 (1988)).

From the CWA's passage until the 1990s, the Corps explicitly stated that drainage and irrigation ditches are *not* "waters of the United States." *See supra* n.3. Despite such disclaimers, the Corps now asserts that the roadside ditch is a "tributary" and therefore a "navigable water" subject to the CWA. But the Corps's regulations do not define the term "tributary" or otherwise suggest that a ditch is a tributary.

The Corps's litigation position is not supported by the type of well-reasoned exercise of agency expertise that might have emerged on the subject of ditches during a public notice-and-comment rulemaking process.[12] Indeed, the Corps's claim that the roadside ditch is itself a water of the United States is a *post hoc* position developed *after*

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[12] The Corps's approach here is in stark contrast to the years-long rulemaking process this Court relied on in *Riverside*, where the Corps amassed an administrative record supporting its conclusion to regulate wetlands adjacent to open water. 474 U.S. at 134.

the complaint was filed. In short, the Fourth Circuit compounded its failure to apply the clear statement rule by deferring to the Corps's unreasonable position.

CONCLUSION

Within the last decade, it took two cases for this Court to clarify the scope of the Commerce Clause—first *Lopez* (1995), then *Morrison* (2000). This case is to *SWANCC* what *Morrison* was to *Lopez*. The lower courts have split on the meaning of "significant nexus," the importance of federalism, and the need for a clear congressional statement to support an agency interpretation that trenches on traditional state functions. The Deatons find themselves—as do countless other landowners and state and local agencies—on the wrong side of the divide. The serious constitutional implications and the importance of the issues to the Deatons, other landowners, and regulators warrant certiorari.

DATED: November 10, 2003

Respectfully submitted,

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Supreme Court, U.S.
FILED

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No.

In The

Supreme Court of the United States

JAMES S. and REBECCA DEATON,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX A

PUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JAMES S. DEATON; REBECCA DEATON,
Defendants-Appellants,

THE CHESAPEAKE BAY FOUNDATION, INCORPORATED; STATE OF MARYLAND, DEPARTMENT OF THE ENVIRONMENT,
Amici Supporting Appellee.

No. 02-1442

Appeal from the United States District Court
for the District of Maryland, at Baltimore.
Marvin J. Garbis, District Judge.
(CA-95-2140-MJG)
Argued: December 5, 2002
Decided: June 12, 2003
Before WILKINSON, LUTTIG, and MICHAEL, Circuit Judges.

Affirmed by published opinion. Judge Michael wrote the opinion, in which Judge Wilkinson and Judge Luttig joined.

COUNSEL

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ON BRIEF: Virginia S. Albrecht, Stephen M. Nickelsburg, HUNTON & WILLIAMS, Washington, D.C.; Duane J. Desiderio, Thomas Jon Ward, NATIONAL ASSOCIATION OF HOME BUILDERS, Washington, D.C., for Appellants. Thomas M. DiBiagio, United States Attorney, Thomas L. Sansonetti, Assistant Attorney General, Greer S. Goldman, Ethan G. Shenkman, Environment & Natural Resources Division, UNITED STATES DEPARTMENT OF JUSTICE, Baltimore, Maryland, for Appellee. Roy A. Hoagland, Denise Stranko, THE CHESAPEAKE BAY FOUNDATION, INC., Annapolis, Maryland; Janice L. Goldman-Carter, Edina, Minnesota, for Amicus Curiae Foundation. J. Joseph Curran, Jr., Attorney General of Maryland, Adam D. Snyder, Assistant Attorney General, Baltimore, Maryland, for Amicus Curiae State.

OPINION

MICHAEL, Circuit Judge:

This is the second appeal by James and Rebecca Deaton, who were sued by the government under the Clean Water Act (sometimes, "the CWA" or "the Act"), 33 U.S.C. § 1251 *et seq.*, for failing to obtain a permit from the U.S. Army Corps of Engineers (the Corps) before digging a ditch and depositing excavated dirt in wetlands on their property. The Corps asserts jurisdiction because the Deatons' wetlands are adjacent to, and drain into, a roadside ditch whose waters eventually flow into the navigable Wicomico River and Chesapeake Bay. The Deatons' main argument is that the Corps has no authority over the roadside ditch, and thus the agency cannot regulate their wetlands. First, we hold that Congress's power under the Commerce Clause to protect navigable

waters allows it to regulate the discharge of pollutants that flow into the ditch. Congress delegated part of this authority to the Corps in the Clean Water Act. The Corps, in turn, has promulgated a regulation, 33 C.F.R. § 328.3(a)(5), that extends CWA jurisdiction to tributaries of navigable waters. This regulation represents a reasonable interpretation of the CWA that is entitled to deference. The Corps interprets its regulation to cover the roadside ditch, and we also defer to that interpretation. Second, we hold that the district court did not err when it decided that the Corps used an appropriate indicator for wetland hydrology (prescribed by its Wetlands Delineation Manual) in designating parts of the Deatons' property as wetlands. Finally, we affirm the district court's remediation order, which requires the Deatons to fill in the ditch and restore their wetlands to their pre-violation condition.

I.

The Delmarva Peninsula separates the Chesapeake Bay from the Atlantic Ocean. Since 1989 the Deatons have owned an undeveloped, twelve-acre parcel of land located roughly in the center of the peninsula, near Parsonsburg in Wicomico County, Maryland. The parcel slopes gently downhill toward a county road, Morris Leonard Road. A drainage ditch runs alongside the road between the pavement and the Deatons' property. The Deatons call the ditch the "Morris Leonard Road ditch," while the Corps calls it the "John Adkins Prong of Perdue Creek." We will call it the "roadside ditch." The parties agree that surface water from the Deatons' property drains into the roadside ditch. They disagree about how much water flows through the ditch, and how consistent the flow is, but they agree on the ditch's course. Water from the roadside ditch takes a winding, thirty-two-mile path to the Chesapeake Bay. At

the northwest edge of the Deatons' property, the roadside ditch drains into a culvert under Morris Leonard Road. On the other side of the road, the culvert drains into another ditch, known as the John Adkins Prong of Perdue Creek. Perdue Creek flows into Beaverdam Creek, a natural watercourse with several dams and ponds. Beaverdam Creek is a direct tributary of the Wicomico River, which is navigable. Beaverdam Creek empties into the Wicomico River about eight miles from the Deatons' property. About twenty-five river miles further downstream, the Wicomico River flows into the Chesapeake Bay, a vast body of navigable water.

The Deatons bought the twelve-acre parcel for the purpose of developing a small (five-lot) residential subdivision. There was a problem, however, because much of the property was poorly drained. In particular, there was a large, low, wet area in the middle where water stood in the winter months and after heavy rainfall. Because of the drainage problem, the Wicomico County Health Department denied the Deatons' application for a sewage disposal permit. The Deatons then decided to dig a drainage ditch across the property. A technician from the U.S. Soil Conservation Service (SCS) advised Mr. Deaton, however, that a large portion of the property contained nontidal wetlands and that he would need a permit from the Corps before undertaking any ditching work. In early 1990 the Deatons, without seeking a Corps permit, hired a contractor who dug a 1,100-foot ditch that crossed the areas of the property identified as wetlands by the SCS technician. The contractor piled the excavated dirt on either side of the ditch, a practice known as sidecasting.

The Corps learned about the Deatons' ditching project in July 1990 and promptly initiated regulatory action. The

details are discussed in our prior opinion, *United States v. Deaton,* 209 F.3d 331, 333 (4th Cir. 2000). In short, the Corps issued a stop-work order to the Deatons, warning them that their placement of fill material in a wetland violated § 404(a) of the Clean Water Act, 33 U.S.C. § 1344(a), and that no further work should be done without a permit. After a period of lengthy, but unsuccessful, negotiations with the Deatons, the government in 1995 filed a civil complaint alleging that the Deatons had violated the Clean Water Act by discharging fill material into regulated wetlands without a permit. The district court ultimately concluded in the first round that sidecasting did not constitute the discharge of a pollutant under the Act and granted summary judgment to the Deatons. We reversed, holding that "the Clean Water Act's definition of discharge as 'any addition of any pollutant to navigable waters' encompasses sidecasting in a wetland." *Deaton,* 209 F.3d at 337 (referring to 33 U.S.C. § 1362(12)). We remanded the case for further proceedings.

Not long after our remand order, the Supreme Court decided *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers,* 531 U.S. 159 (2001) (*SWANCC*). *SWANCC* held that the Corps exceeded its statutory authority under § 404(a) of the Clean Water Act when it interpreted the Act (through 33 C.F.R. § 328.3(a)(3) and the Migratory Bird Rule, 51 Fed. Reg. 41,217 (1986)) to cover an isolated, intrastate gravel pit that was filled with water and used by migratory birds. *Id.* at 162-63, 174. Because *SWANCC* provides new guidance for analyzing the Corps's jurisdiction under the Clean Water Act, the Deatons filed a motion on September 10, 2001, asking the district court to reconsider the issue of CWA jurisdiction in this case.

The Deatons argued that under *SWANCC* the Clean Water Act cannot be read to extend Corps jurisdiction to their wetlands or the roadside ditch and that if the Act does extend that far, Congress exceeded its authority under the Commerce Clause, U.S. Const. Art. I, § 8, cl. 3. On January 29, 2002, the district court entered an order denying the motion to reconsider, holding (1) that the Deatons' wetlands are adjacent to the roadside ditch, which is a tributary of navigable waters, (2) that "[b]ecause there is a hydrologic connection between the Deaton wetlands and navigable waters," *SWANCC* does not bar CWA jurisdiction, and (3) that protecting the Deatons' wetlands is reasonably related to Congress's authority under the Commerce Clause to protect navigable waters as channels of commerce. Five days later, on February 4, 2002, the district court entered a remediation order directing the Deatons to restore their property "to its pre-violation condition and elevation." The Deatons appeal these orders.

II.

A.

The Deatons' appeal of the district court's order denying their motion to reconsider Clean Water Act (or Corps) jurisdiction presents a question of law that we review de novo. *See Meekins v. United Transp. Union,* 946 F.2d 1054, 1057 (4th Cir. 1991). We begin with the statutory and regulatory framework for Corps jurisdiction in this case. Section 404(a) of the Clean Water Act requires a permit issued by the Secretary of the Army, through the Corps of Engineers, for the discharge of fill material into "navigable waters." 42 U.S.C. § 1344(a), (d). The Act defines "navigable waters" as "waters of the United States, including the territorial seas." 42 U.S.C. § 1362(7). The Corps's jurisdictional regulations define

"waters of the United States" to include, among others, (i) traditional navigable waters, that is, "waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce," 33 C.F.R. § 328.3(a)(1), (ii) tributaries of covered waters, including traditional navigable waters, *id.* § 328.3(a)(5), and (iii) wetlands adjacent to covered waters, including tributaries, *id.* § 328.3(a)(7). The Corps asserts jurisdiction over the Deatons' wetlands because they are adjacent to the roadside ditch, which is a tributary of the Wicomico River, a traditional navigable water.

In *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985), the Supreme Court upheld Corps regulations "requir[ing] permits for the discharge of fill material into wetlands adjacent to the 'waters of the United States.'" *Id.* at 139. Several courts have held that *SWANCC* limited this holding to wetlands adjacent to traditional navigable waters. *E.g.*, *Rice v. Harken Energy Co.*, 250 F.3d 264, 268-69 (5th Cir. 2001); *United States v. RGM Corp*, 222 F.Supp. 2d 780, 785-86 (E.D. Va. 2002); *United States v. Newdunn Assocs.*, 195 F. Supp. 2d 751, 763, 767-68 (E.D. Va. 2002), appeal pending sub nom. *Treacy v. Newdunn Assocs.*, No. 02-1480(L) (4th Cir.); *United States v. Rapanos*, 190 F.Supp. 2d 1011, 1015-16 (E.D. Mich. 2002). The Deatons do not press for that limitation here. They argue instead that the roadside ditch is not covered by the Clean Water Act, which means that their wetlands are not adjacent to any covered water. As a result, the Deatons say, they did not need a permit to discharge fill material into their wetlands. It is undisputed that the Deatons' wetlands are adjacent to the roadside ditch. Thus, if the ditch is covered, so are the wetlands. Our analysis, then, will focus on whether the Corps has jurisdiction over the roadside ditch.

B.

The Deatons first argue that the Corps's tributaries regulation, which interprets the Clean Water Act to reach the roadside ditch, pushes the limits of Congressional authority under the Commerce Clause and thereby raises a serious constitutional question. According to the Deatons, Congress did not give a clear indication that it intended the Act to reach tributaries so far from navigable waters, and therefore we should avoid the question of whether regulation of the ditch is constitutional by holding that Congress did not authorize it under the Act. The Deatons argue in the alternative that even if Congress authorized the Corps's regulation of the roadside ditch under the CWA, that authorization is invalid because it exceeds Congress's power under the Commerce Clause. The Corps, of course, contends that its assertion of CWA jurisdiction over the roadside ditch through its tributaries regulation, 33 C.F.R. § 328.3(a)(5), represents a proper exercise of power granted to Congress by the Constitution and delegated to the Corps. For the reasons that follow, we hold that the CWA, as implemented by the Corps's regulation, fits comfortably within Congress's authority to regulate navigable waters.

The regulation reflects the Corps's interpretation of the CWA, and the Deatons' arguments require us to undertake a somewhat complicated analysis. The Deatons begin their first argument by saying that the Corps's regulation cannot survive the threshold analysis required by *SWANCC:* when "an administrative interpretation of a statute invokes the outer limits of Congress' power," the interpretation is not entitled to deference under *Chevron U.S.A. v. Natural Resources Defense Council,* 467 U.S. 837 (1984), unless Congress gave "a clear indication that [it] intended that result." *SWANCC,* 531 U.S. at 172

(citing *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. and Constr. Trades Council,* 485 U.S. 568, 575 (1988)). This requirement, the Court said, stems from a "prudential desire not to needlessly reach constitutional issues and [an] assumption that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority." *Id.* at 172-73. Moreover, "[t]his concern is heightened where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power." *Id.* at 173. "Thus, 'where an otherwise acceptable construction of a statute would raise serious constitutional problems, [courts] will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.'" *Id.* at 173 (quoting *DeBartolo,* 485 U.S. at 575).

SWANCC and *DeBartolo* must be read in light of *Rust v. Sullivan,* 500 U.S. 173 (1991). *See Williams v. Babbitt,* 115 F.3d 657, 661-63 (9th Cir. 1997) (comparing *DeBartolo* and *Rust*). In *Rust* the Supreme Court proceeded to decide the constitutionality of an agency's regulations because, while the constitutional arguments against the regulations had "some force," the arguments did not "raise the sort of grave and doubtful constitutional questions" that would require a clear indication from Congress that it intended to authorize the agency's interpretation. *Rust,* 500 U.S. at 191 (internal quotation marks and citation omitted). Thus, the Court said, it did not have to "invalidate the regulations in order to save the statute from unconstitutionality." *Id.* In sum, when "we do not face the sort of serious constitutional questions 'that would lead us to assume Congress did not intend to authorize [the regulation's] issuance,'" we may decide the constitutional question and proceed to the *Chevron* analysis. *Republican Nat'l Comm. v. Fed. Election*

Comm'n, 76 F.3d 400, 409 (D.C. Cir. 1996) (quoting *Rust*, 500 U.S. at 191).

Our initial task is to determine whether the constitutional question - does the Commerce Clause give Congress authority over the roadside ditch - is serious enough to warrant rejection of the Corps's regulation. The Commerce Clause of our Constitution grants Congress authority over three distinct spheres: "[1] the use of the channels of interstate commerce . . . [2] the instrumentalities of interstate commerce, or persons or things in interstate commerce . . . [and 3] those activities having a substantial relation to interstate commerce." *United States v. Lopez*, 514 U.S. 549, 558-59 (1995). The activities regulated under the third category must be "economic in nature." *United States v. Morrison*, 529 U.S. 598, 613 (2000). *See also GDF Realty Invs., Inc. v. Norton*, 326 F.3d 622, 633-36 (5th Cir. 2003). Congress enacted the Clean Water Act under "its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made." *SWANCC*, 531 U.S. at 172. *See also id.* at 168 n.3. The power over navigable waters is an aspect of the authority to regulate the channels of interstate commerce. *Gibbs v. Babbitt*, 214 F.3d 483, 490-91 (4th Cir. 2000) (including "navigable rivers, lakes, and canals" among the channels of commerce) (citation omitted); *United States v. Ballinger*, 312 F.3d 1264, 1269 (11th Cir. 2002).

Congress's power over the channels of interstate commerce, unlike its power to regulate activities with a substantial relation to interstate commerce, reaches beyond the regulation of activities that are purely economic in nature. The power to regulate channels of interstate commerce allows Congress to make laws that protect the flow of commerce. *See Heart of Atlanta Motel*,

Inc. v. United States, 379 U.S. 241, 257 (1964) (upholding congressional power to bar racial discrimination in hotels because this discrimination had a "disruptive effect . . . on commercial intercourse"); *United States v. Darby,* 312 U.S. 100, 114-15 (1941) (upholding congressional power to forbid interstate commerce in goods made by child labor because traffic in such goods encourages "competition . . . injurious to the commerce"). Some of the power exercised by Congress in enacting the Clean Water Act is grounded in the authority to protect the flow of commerce in "navigable waters as channels or instrumentalities of interstate commerce." *United States v. Wilson,* 133 F.3d 251, 256 (4th Cir. 1997). *See also United States v. Ashland Oil & Transp. Co.,* 504 F.2d 1317, 1325-26 (6th Cir. 1974) (noting hazards to navigation posed by pollution).

The Deatons argue that the power over navigable waters is limited to legislation aimed at protecting or encouraging navigation and the flow of commerce. However, the Supreme Court cases discussing congressional power over channels of interstate commerce make clear that this view is too narrow. Congressional power to regulate the use of commercial channels goes further: "the authority of Congress to keep the channels of interstate commerce free from immoral and injurious uses has been frequently sustained . . . ." *Caminetti v. United States,* 242 U.S. 470, 491 (1917) (quoted in *Lopez,* 514 U.S. at 558). In *Caminetti* the Supreme Court held that the Mann Act, which barred the transport of "any woman or girl" in interstate channels for an "immoral purpose" was within congressional authority, even though the defendant's conduct - transporting a woman across state lines to "be and become his mistress and concubine" - was entirely noncommercial. *Id.* at 483, 485; *see also Perez v. United States,* 402 U.S. 146, 150 (1971) (acknowledging

congressional power to regulate "the use of channels of interstate . . . commerce which Congress deems are being misused"); *Heart of Atlanta Motel,* 379 U.S. at 256 (citing *Caminetti); cf. Ballinger,* 312 F.3d at 1270 ("Congress may regulate *any* instrumentality or channel of interstate commerce . . . ."); *United States v. Horton,* 321 F.3d 476, 481 n.3 (4th Cir. 2003) (reading federal kidnapping statute as exercise of congressional power to prevent "misuse" of channels of commerce by a kidnapper trying "to cover up his trail by moving evidence of his crime into a different state's jurisdiction"). *But cf. United States v. Abdullah,* 162 F.3d 897, 901 (6th Cir. 1998) (suggesting that a statute enacted under this authority must have as its purpose "to keep open the very avenues by which interstate commerce is transacted"). The Deatons are correct that many cases concerning the power over navigable waters focus on congressional authority to regulate in aid of navigation. *E.g., Gilman v. Philadelphia,* 70 U.S. (3 Wall.) 713, 724-25 (1866); *United States v. Appalachian Elec. Power Co.,* 311 U.S. 377, 404-05 (1940). But there is no reason to believe Congress has less power over navigable waters than over other interstate channels such as highways, which may be regulated to prevent their "immoral and injurious use[ ]." *Caminetti,* 242 U.S. at 491.

Congress's authority over the channels of commerce is thus broad enough to allow it to legislate, as it did in the Clean Water Act, to prevent the use of navigable waters for injurious purposes. *See Caminetti,* 242 U.S. at 491; *Lopez,* 514 U.S. at 558. For example, Congress may outlaw the use of navigable waters as dumping grounds for fill material. The power over navigable waters also carries with it the authority to regulate nonnavigable waters when that regulation is necessary to achieve Congressional goals in protecting navigable waters. *See*

Oklahoma ex rel. Phillips v. Guy F. Atkinson Co., 313 U.S. 508, 525-26 (1941); *United States v. Rio Grande Dam Irrigation Co.*, 174 U.S. 690, 708-09 (1899); *see also United States v. Grand River Dam Auth.*, 363 U.S. 229, 232 (1960). Any pollutant or fill material that degrades water quality in a tributary of navigable waters has the potential to move downstream and degrade the quality of the navigable waters themselves. Indeed, the principle that Congress has the authority to regulate discharges into nonnavigable tributaries in order to protect navigable waters has long been applied to the Clean Water Act. *See, e.g., Ashland Oil,* 504 F.2d at 1325-29; *cf. United States v. Hartsell,* 127 F.3d 343, 348-49 (4th Cir. 1997). The Deatons argue that their discharge (or sidecasting of dirt) into wetlands adjacent to the roadside ditch is too trivial to affect water quality in navigable waters. Congress, however, may decide that the aggregate effect of all of the individual instances of discharge, like the discharge by the Deatons, justifies regulating each of them. *See Wickard v. Filburn,* 317 U.S. 111 (1942). And if Congress itself has the authority to make that decision, it may delegate it to the Corps, as long as it provides an "intelligible principle" to guide the agency's decisionmaking. *See, e.g., J. W. Hampton, Jr. & Co. v. United States,* 276 U.S. 394, 409 (1928); *Skinner v. Mid-Am. Pipeline Co.*, 490 U.S. 212, 218-24 (1989); *see also Darby,* 312 U.S. at 120-21. Congress passed the Clean Water Act "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters," 33 U.S.C. § 1251(a), and gave the Corps, along with the Environmental Protection Agency, the job of getting this done. The Corps has pursued this goal by regulating nonnavigable tributaries and their adjacent wetlands. This use of delegated authority is well within Congress's traditional power over navigable waters.

It follows that under the Corps's interpretation, the Clean Water Act does not invade an area of authority reserved to the states. The power to protect navigable waters is part of the commerce power given to Congress by the Constitution, and this power exists alongside the states' traditional police powers. "Although States have important interests in regulating . . . natural resources within their borders, this authority is shared with the Federal Government when the Federal Government exercises one of its enumerated powers . . . ." *Minnesota v. Mille Lacs Band of Chippewa Indians,* 526 U.S. 172, 204 (1999). *Cf. Gibbs,* 214 F.3d at 499-501 (concluding that the application of the Endangered Species Act to private land does not unconstitutionally interfere with local power over land use or wildlife); *GDF Realty Invs.,* 326 F.3d at 639 (same). The federal decision to regulate the discharge of pollutants into tributaries of navigable waters does not "significantly change[ ] the federal-state balance." *See United States v. Bass,* 404 U.S. 336, 349 (1971).

In sum, the Corps's regulatory interpretation of the term "waters of the United States" as encompassing nonnavigable tributaries of navigable waters does not invoke the outer limits of Congress's power or alter the federal-state framework. The agency's interpretation of the statute therefore does not present a serious constitutional question that would cause us to assume that Congress did not intend to authorize the regulation. Indeed, as our discussion of Congress's Commerce Clause authority makes clear, the federal assertion of jurisdiction over nonnavigable tributaries of navigable waters is constitutional.

C.

The thrust of the Deatons' final argument about the

Corps's jurisdiction is this: even if the Corps could regulate the roadside ditch without causing a constitutional problem, neither the Clean Water Act nor the Corps's regulation extends coverage to the ditch. Here, the Deatons make a two-part argument. First, they argue that even if the Act authorizes the Corps to regulate the nonnavigable tributaries of navigable waters, the roadside ditch is not such a tributary. They say that the ditch does not meet the definition of "tributary" at all or, alternatively, it is not a tributary *of* a navigable water because water flowing from the ditch must pass through several other nonnavigable watercourses before reaching the navigable Wicomico River. In short, the Deatons are arguing here that the Corps is misinterpreting its own regulation by using the tributaries provision, 33 C.F.R. § 328.3(a)(5), to assert jurisdiction over the roadside ditch. Second, they argue that if the tributary regulation does cover the ditch, the regulation is an unreasonable interpretation of the CWA. We hold that we should defer to the Corps's interpretation of its regulation to include the ditch and that the regulation, read this way, is a reasonable interpretation of the Clean Water Act.

This finally brings us to *Chevron,* and we analyze the Deatons' statutory and regulatory coverage arguments as follows. We begin with the first step of the *Chevron* analysis, *see* 467 U.S. at 842, and determine whether the Clean Water Act delegates authority to the Corps to decide whether to regulate nonnavigable tributaries. Specifically, we ask "whether Congress has directly spoken to the precise question at issue." *Id.* When Congress has not spoken directly, but instead has been "silent or ambiguous" on the issue, it has by implication delegated authority to the agency charged with administering the statute, allowing the agency to clarify the ambiguity or fill the gap. *Id.* at 843-45. *See also*

Smiley v. Citibank (South Dakota), N.A., 517 U.S. 735, 742 (1996). If we conclude that the statute is silent or ambiguous, we normally move directly to the second step in the *Chevron* analysis, *see* 467 U.S. at 843, and determine whether the agency's regulation reflects a reasonable construction of the statute, *id.*

In this case, however, we are sidetracked by another issue: the meaning of the regulation itself. The Corps interprets its regulation to cover the roadside ditch, but the Deatons contend that the Corps's interpretation cannot be squared with the words of the regulation. As a result of this dispute, we must, before proceeding to *Chevron's* step two, determine what the regulation actually means. *Kentuckians for the Commonwealth v. Rivenburgh,* 317 F.3d 425, 439 (4th Cir. 2003). We give "controlling weight" to an agency's interpretation of its own regulation, "unless [the interpretation] is plainly erroneous or inconsistent with the regulation." *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 413-14 (1945). *See also Auer v. Robbins,* 519 U.S. 452, 461 (1997); *Kentuckians,* 317 F.3d at 439; *United States v. Hoechst Celanese Corp.*, 128 F.3d 216, 221 (4th Cir. 1997). If the regulation is unambiguous, then what is known as *Seminole Rock* deference does not apply, and the regulation's plain language, not the agency's interpretation, controls. *Christensen v. Harris County,* 529 U.S. 576, 588 (2000). Once we have determined what the regulation means, we can move on to the second step of *Chevron,* 467 U.S. at 843, and decide whether the regulation is based on a reasonable construction of the statute. *See Kentuckians,* 317 F.3d at 439-40 (combining use of *Seminole Rock* and *Chevron* tests).

We turn to the initial question of whether the statute is ambiguous. If Congress has "spoken to the precise

question at issue," there is no ambiguity and thus no room for the agency interpretation. *Chevron,* 467 U.S. at 842-43. The precise question here is whether the Clean Water Act extends to distant, nonnavigable tributaries of navigable waters. Section 404(a) of the CWA regulates discharges into "navigable waters," 42 U.S.C. § 1344(a), and the Act defines "navigable waters" as "waters of the United States," *id.* § 1362(7). The Corps's regulations interpret the term "waters of the United States." If Congress had stopped with the basic term "navigable waters," the term used in § 404(a), 42 U.S.C. § 1344(a), many years of judicial precedent would give us the following clear meaning: "[waters] are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water." *The Daniel Ball,* 77 U.S. (10 Wall.) 557, 563 (1871). *See also Appalachian Elec. Power Co.,* 311 U.S. at 404-10. In the Clean Water Act Congress elected to redefine "navigable waters," moving away from the traditional definition. Its choice of the expansive phrase "waters of the United States" indicates an intent to "regulate at least some waters that would not be deemed 'navigable' under the classical understanding of that term." *Riverside Bayview,* 474 U.S. at 133.

SWANCC, of course, emphasizes that the CWA is based on Congress's power over navigable waters, suggesting that covered nonnavigable waters are those with some connection to navigable ones. *See SWANCC,* 531 U.S. at 167, 172. But we cannot tell from the Act the extent to which nonnavigable tributaries are covered. The statutory term "waters of the United States" is sufficiently ambiguous to constitute an implied delegation of authority to the Corps; this authority permits the Corps to determine

which waters are to be covered within the range suggested by *SWANCC. See Chevron*, 467 U.S. at 843 ("'The power of an administrative agency to administer a congressionally created . . . program necessarily requires . . . the making of rules to fill any gap left . . . by Congress.'") (quoting *Morton v. Ruiz,* 415 U.S. 199, 231 (1974)).

We next look for the meaning of the regulation promulgated under this delegated authority. Before deferring to the agency interpretation under *Seminole Rock,* we first decide whether the regulation is ambiguous. *Christensen,* 529 U.S. at 588. The regulation, 33 C.F.R. § 328.3(a)(5), defines "waters of the United States" to include tributaries of navigable waters. The Deatons argue that it is wrong to read the regulation to reach all branches of a system that eventually flow into a navigable waterway. They contend that the term "tributary" in the regulation refers only to a nonnavigable branch that empties directly into a navigable waterway. Thus, they say, the roadside ditch is not a tributary of the navigable Wicomico River. We must decide whether this issue is settled by the plain language of the regulation.

Webster's Third New International Dictionary (1993) defines "tributary" as (1) "providing with or serving as a channel for supplies or additional matter" or (2) "one that is tributary to another: as . . . a stream." According to this definition, "tributary" in the regulation would encompass the entire feeder system for a navigable water because even a stream many branches away eventually provides "additional matter" for the navigable water. On the other hand, *Webster's II New Riverside University Dictionary* (1988) defines tributary as "[a] river or stream flowing into a larger river or stream." Under this definition a watercourse like the roadside ditch appears to be a tributary, but it is not clear that it would be a tributary *of* a

larger river several branches downstream. It could be read to mean that only streams flowing directly into a larger river are the larger river's tributaries. The dictionaries thus agree that the roadside ditch is a tributary, but they do not settle the question of whether it is a tributary of a navigable water (here, the Wicomico River), which is what the regulation covers. "The existence of alternative dictionary definitions of the word '[tributary],' each making some sense under the [regulation], itself indicates that the [regulation] is open to interpretation." *Nat'l R.R. Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407, 418 (1992). We conclude that the regulation is ambiguous on the question of how far the coverage of tributaries extends. We therefore turn to the agency's interpretation.

The Corps asserts in its brief that "tributaries" in the regulation means "all tributaries, "not just" 'short' or 'primary' tributaries." Appellee's Br. at 37. In the preamble to a prior generation of CWA regulations, the agency wrote that "Corps *jurisdiction* . . . would extend to ... all tributaries (primary, secondary, tertiary, etc) of navigable waters." 40 Fed. Reg. 31,320 (1975) (emphasis added). As the Deatons point out, these old regulations cut off Corps jurisdiction at the "headwaters" of a tributary, defined by a minimum water flow that the roadside ditch would not meet. *Id.* at 31,321, 31,324. But we are concerned here with the definition of the word "tributary." Although the Corps has not always chosen to regulate all tributaries, it has always used the word to mean the entire tributary system, that is, all of the streams whose water eventually flows into navigable waters. *Cf. Headwaters, Inc. v. Talent Irrigation Dist.* 243 F.3d 526, 533 (9th Cir. 2001) (considering "tributary" to reach all branches of a system without referring to Corps's interpretation). Because the Corps's longstanding interpretation of the word "tributary" has support in the dictionary and

elsewhere, it is not plainly erroneous. Nor is it inconsistent with the regulation. The interpretation is therefore entitled to *Seminole Rock* deference. In short, the word "tributaries" in the regulation means what the Corps says it means.

Now that we know the meaning of the regulation - jurisdiction extends to any branch of a tributary system that eventually flows into a navigable body of water - we can proceed to step two of the *Chevron* inquiry: is the regulation "based on a permissible construction" of the Clean Water Act. *Chevron,* 467 U.S. at 843. The Deatons rely on a passage from *SWANCC* to assert that the Corps's current jurisdictional interpretation cannot be reasonable. In *SWANCC* the Supreme Court said that the Corps had "put forth no persuasive evidence that [it] mistook Congress' intent" when it promulgated the first set of CWA regulations in 1974, shortly after the Act was passed. *SWANCC,* 531 U.S. at 168. The first regulations were narrow, reaching only navigable waters. *See* 39 Fed. Reg. 12,115, 12,119 (1974).

We do not read *SWANCC* to hold that the 1974 regulations represent the only permissible interpretation of the Clean Water Act. Those regulations captured what *SWANCC* holds to be Congress's general intent in enacting the CWA, that is, to exercise its power over navigable waters for the purpose of protecting their chemical, physical, and biological integrity. *See SWANCC,* 531 U.S. at 166, 172 (citing 33 U.S.C. § 1251(a)). In the case before us, however, our conclusion in step one of the *Chevron* inquiry - that the CWA is ambiguous when it comes to jurisdictional coverage - shows that Congress intended to delegate authority to the Corps to decide how far coverage must extend in order to protect the navigable waters. We defer to an agency's

reasonable interpretation not because the agency is in a better position to know what Congress really wanted, but "because of a presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows." *Smiley,* 517 U.S. at 740-41. Over the years, the Corps's understanding of the best way to exercise its discretion under the CWA has evolved. *See Newdunn Assocs.,* 195 F. Supp. 2d at 759-62 & n.8 (detailing changes to Corps's CWA jurisdictional regulations through revisions and interpretations in 1974, 1975, 1977, 1982, 1986, and 1990).

To conclude that the Corps's current interpretation is reasonable, "we need not find that [its interpretation] is the only permissible construction . . . but only that [the agency's] understanding of this . . . statute is a sufficiently rational one to preclude a court from substituting its judgment for [the agency's]." *Chem. Mfrs. Ass'n v. Natural Res. Def. Council, Inc.,* 470 U.S. 116, 125 (1985) (quotation marks omitted). An agency is allowed to change its mind, so long as its new interpretation is reasonable. *Smiley,* 517 U.S. at 742. In other words, "the mere fact that an agency interpretation contradicts a prior agency position is not fatal." *Id. See also Rust,* 500 U.S. at 186-87; *Chevron,* 467 U.S. at 863-64; *United States v. Mead Corp,* 533 U.S. 218, 247 (2001) (Scalia, J., dissenting) ("Where *Chevron* applies, statutory ambiguities remain ambiguities subject to the agency's ongoing clarification."); *Piney Mtn. Coal Co. v. Mays,* 176 F.3d 753, 766-67 (4th Cir. 1999); *Mass. v. FDIC,* 102 F.3d 615, 621 (1st Cir. 1996). There is no suggestion that the Corps's current interpretation represents a "[s]udden and unexplained change" or that it "does not take account

of legitimate reliance on prior interpretation." *Smiley*, 517 U.S. at 742 (citing *Motor Vehicle Mfrs. Ass'n of United States, Inc v. State Farm Mut. Auto. Ins. Co*, 463 U.S. 29, 46-57 (1983); *United States v. Pa. Indus. Chem. Corp.*, 411 U.S. 655, 670-75 (1973); *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 295 (1974)).

Accordingly, if the Corps's current interpretation, 33 C.F.R. § 328.3(a)(5), is based on a reasonable construction of the statute, we will defer to the Corps. We conclude that deference is appropriate. In *Riverside Bayview* the Supreme Court concluded that the Corps regulation extending jurisdiction to adjacent wetlands was a reasonable interpretation in part because of what *SWANCC* described as "the significant nexus between the wetlands and 'navigable waters.'" *SWANCC*, 531 U.S. at 167. There is also a nexus between a navigable waterway and its nonnavigable tributaries. The Corps argues, with supporting evidence, that discharges into nonnavigable tributaries and adjacent wetlands have a substantial effect on water quality in navigable waters. The Deatons do not suggest that this effect is overstated. This nexus, in light of the "breadth of congressional concern for protection of water quality and aquatic ecosystems," *Riverside Bayview*, 474 U.S. at 133, is sufficient to allow the Corps to determine reasonably that its jurisdiction over the whole tributary system of any navigable waterway is warranted. The regulation, as the Corps reads it, reflects a reasonable interpretation of the Clean Water Act. The Act thus reaches to the roadside ditch and its adjacent wetlands.

III.

The Deatons next argue that the district court erred when it held that the Corps used a correct indicator for wetland hydrology (taken from its Wetlands Delineation Manual) in designating parts of their property as wetlands.

The Corps's underlying wetlands regulation, which the Deatons do not challenge, defines wetlands as "areas that are inundated or saturated by surface or ground water" and are home to "vegetation typically adapted for life in saturated soil conditions." 33 C.F.R. § 328.3(b). To assist in applying this regulation, the Corps uses its Wetlands Delineation Manual, known as the 1987 Manual. *See* Waterways Experiment Station, Dep't of the Army, Corps of Engineers Wetlands Delineation Manual (1987). According to the manual, wetlands have "general diagnostic environmental characteristics" in the following three categories: vegetation, soil classification (hydric), and hydrology. 1987 Manual at 13-14. The Deatons do not dispute that their property meets the vegetation and soil criteria. However, they claim that their property lacks the required hydrology.

The 1987 Manual lists several methods for determining an area's hydrology, ranking them by reliability. *Id.* at 37-41. Using recorded data on water levels, flooding, and soil saturation is the most reliable method. Using field data is next. *Id.* Among the acceptable ways of gathering field data, the second most reliable is "[v]isual observation of soil saturation," which involves digging a hole in the soil and observing water levels. In order to influence the characteristics of vegetation (and meet the wetlands hydrology criterion), water must saturate the soil "within a major portion of the root zone (usually within 12 inches of the surface)." *Id.* The Corps determined that the Deatons' property met the hydrology requirement by using the manual's visual observation method and finding that the soil was saturated to within twelve inches of the surface. The Deatons conducted their own observations, using twenty-two wells to monitor and record groundwater levels for several months. According to the Deatons, their study confirms that the areas in question were not

saturated *to the surface* for a sufficient time to be considered wetlands. The Deatons rely on certain language in the manual describing wetlands hydrology as soil "saturation to the surface at some time during the growing season." 1987 Manual at 34. They therefore argue that the observation-based data showing soil saturation within twelve inches of the surface does not permit a wetlands classification and that the Corps misinterpreted the manual in making the classification. The Corps's wetlands classification, however, did not involve an interpretation (or misinterpretation) of the manual. The "within twelve inches" indicator is spelled out in the manual, and the Corps simply found this indicator to be present.

The analysis of the Deatons' attack on the Corps's reliance on the "saturation within twelve inches of the surface" indicator must begin with the Corps's wetlands regulation. Again, the regulation, 33 C.F.R. § 328.3(b), defines wetlands to include areas that are "saturated by surface or ground water." The 1987 Manual interprets the regulation. The manual states that areas with wetland hydrology include those where "soils [are] saturated to the surface at some time during the growing season." 1987 Manual at 34. The manual also states that wetland hydrology is present where the saturation has "an overriding influence on characteristics of vegetation." *Id.* Saturation to within twelve inches of the surface is usually sufficient to have an overriding impact on vegetation, according to the manual. *Id.* at 38. Finally, the presence or absence of the "within twelve inches" indicator may be determined by visual observation. *Id.* Here, the Corps simply used the manual's prescribed criterion (the "within twelve inches" indicator) and methodology (visual observation) in determining that the Deatons' property had the required hydrology for wetlands designation. If

the Deatons want to argue that the "within twelve inches" criterion is inappropriate, they must argue that the manual is a flawed interpretation of the regulation defining wetlands. The Deatons, however, do not argue that the manual "is plainly erroneous or inconsistent with" the regulatory definition of wetlands. *See Seminole Rock*, 325 U.S. at 413-14. We are therefore bound to defer to the manual's interpretation of the regulation, *id.*, especially since the interpretation deals in a complex scientific field, wetlands ecology and hydrology. *Cf. Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 697 (1991) (finding particular reason to extend *Chevron* deference when an agency administers a "complex and highly technical regulatory program").

IV.

Finally, the Deatons challenge the District Court's remedial order requiring them to fill in the ditch they dug across their property. The Clean Water Act only regulates the deposit of the material dug out of the ditch, not the digging itself. Therefore, the Deatons argue, requiring them to haul the deposited dirt to a non-wetland part of the property is the proper remedy. According to the Deatons, they would not have needed a permit if they had hauled the dirt away when they dug the ditch, so the remedy for their failure to get a permit should go no further than requiring them to do what would have been lawful in the first place.

We review the scope of a remediation order for abuse of discretion. *See Dixon v. Edwards*, 290 F.3d 699, 718 (4th Cir. 2002); *see also Sasser v. Adm'r, United States EPA*, 990 F.2d 127, 130 (4th Cir. 1993). In evaluating remediation or restoration proposals, courts have considered three factors: (1) whether the proposal "would confer maximum environmental benefits," (2) whether it

is "achievable as a practical matter," and (3) whether it bears "an equitable relationship to the degree and kind of wrong it is intended to remedy." *United States v. Cumberland Farms of Conn., Inc.*, 826 F.2d 1151, 1164 (1st Cir. 1987). *See also United States v. Sexton Cove Estates, Inc.*, 526 F.2d 1293, 1301 (5th Cir. 1976) (Rivers and Harbors Act case); *United States v. Bradshaw*, 541 F. Supp. 884, 885 (D. Md. 1982). Although the district court did not consider each of these factors explicitly, it generally covered them. The court found that allowing the Deatons to haul the dirt away instead of filling the ditch would let them benefit from their violation of the Clean Water Act. Moreover, the court found it "doubtful that [removing the sidecast dirt] could be done in an ecologically harmless manner." In other words, the district court found that the Deatons' remediation proposal would likely compound the environmental damage they had already done. In light of these findings and the Clean Water Act's goal of "restor[ing] and maintain[ing] the chemical, physical, and biological integrity of the Nation's waters," 33 U.S.C. § 1251(a), we conclude that the district court did not abuse its discretion in entering the remediation order.

V.

We affirm the district court's order of January 29, 2002, denying the Deatons' motion to reconsider the issue of Clean Water Act jurisdiction and that court's order of February 4, 2002, requiring remediation.

AFFIRMED

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

UNITED STATES OF AMERICA	*	
Plaintiff	*	
vs.	*	CIVIL ACTION NO. MJG-95-2140
JAMES S. DEATON, et al.	*	
Defendants	*	

* * * * * * * * * *

MEMORANDUM AND ORDER

The Court has before it the Defendants' Post Remand Motion to Reconsider the Issue of Clean Water Act Jurisdiction, the remaining penalty and remedy issues, and the materials submitted by the parties related thereto. The Court has held a hearing, including a site observation visit, and has had benefit of the arguments of counsel.

I. PROCEDURAL BACKGROUND

This action was brought by the United States ("the Government") against James and Rebecca Deaton ("the Defendants" or "the Deatons") under §§ 301(a) and 404 of the Clean Water Act ("the Act"). 33 U.S.C. §§ 1311(a), 1344.

On September 27, 1997, this Court issued a Corrected[1] Memorandum and Order ("Corrected M&O") granting in part the Government's Motion for Summary Judgment. A critical issue presented was whether sidecasting on jurisdictional wetlands constituted the discharge of a pollutant into a water of the United States

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[1] The parties' agreed changes to a September 10, 1997 Memorandum and order were accepted by the Court.

within the meaning of the Clean Water Act. The Court decided that such sidecasting does amount to the discharge of a pollutant under the Act.

On December 23, 1997, the United States Court of Appeals for the Fourth Circuit decided United States v. Wilson, 133 F.2d 251 (4th Cir. 1997), which addressed, but did not resolve, the sidecasting issue. Judge Niemeyer, who wrote the opinion for a three-judge panel, included in his decision a section concluding that sidecasting on jurisdictional wetlands did not constitute the addition of a pollutant to a water of the United States. 133 F.3d 251, 258 (4th Cir. 1997). District Judge Payne expressly disagreed, stating that in his view sidecasting did amount to a discharge of pollution. The third judge on the panel, Judge Luttig, did not address the issue at all.

On June 23, 1998, this Court issued a Memorandum and Order Re: Impact of Wilson stating that it agreed with Judge Payne, but predicted that the Fourth Circuit would adopt the position expressed by Judge Niemeyer. Thus, the Court held that sidecasting was not the discharge of a pollutant and granted summary judgment to the Defendants. Judgment was entered for the Defendants on June 23, 1998. The Government timely appealed. The Defendants cross-appealed, claiming that this Court lacked jurisdiction over the case.

On April 7, 2000, the Fourth Circuit issued its decision on the Government's appeal. In United States v. Deaton, 209 F.3d 331 (4th Cir. 2000), the appellate court resolved the issue left open in Wilson and held that sidecasting did amount to a discharge of pollution, that is the addition of a pollutant. The appellate court decided, in light of the decision on the sidecasting issue, that it would remand the case for further proceedings and not address the issues presented by the cross-appeal.

On remand, the case proceeded with respect to penalty and remedy issues. However, on January 9, 2001, the Supreme Court issued its decision in Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs ("SWANCC"), 531 U.S. 159 (2000), holding that the Corps of Engineers had exceeded its jurisdiction in seeking to regulate certain wetlands. The Defendants filed the instant Motion to Reconsider to seek dismissal of the case for lack of jurisdiction in reliance upon the SWANCC decision.

The parties have presented further evidence, including a site inspection before the Court, with regard to the penalty and remedy issues remaining in the case.

II. JURISDICTION

A. Factual Summary

On June 1, 1989, Defendants James and Rebecca Deaton purchased parcel 117 on Wicomico County Tax Map 31 ("the Parcel") for the purpose of developing a small, residential subdivision. The Parcel is located on Morris Leonard Road near Parsonsburg in Wicomico County, Maryland. In 1990, James Deaton hired a contractor to excavate a drainage ditch on the property. The Defendants do not dispute that part of the Parcel on which the excavation occurred contains wetlands. Nor do they dispute that they conducted sidecasting, i.e. redepositing excavated indigenous materials, on those wetlands, which, if done on jurisdictional wetlands is considered discharging a pollutant under the Act. See Deaton, 209 F.3d 331. The Defendants do dispute, however, that the Parcel includes wetlands that are "waters of the United States" within the meaning of the Act and regulations promulgated thereunder such that the Corps has jurisdiction to regulate them.

B. Discussion

Section 301 (a) of the Act prohibits the discharge of any pollutant, including dredged or fill material, into navigable waters. 33 U.S.C. § 1311(a). As discussed herein, the terms "navigable waters" and "waters of the United States", which are used interchangeably in the statute, are terms of art. Id. § 1362 (7). Under § 404, the Army Corps of Engineers ("the Corps") is authorized to issue permits for discharges of fill material into waters of the United States. Id. § 1344. A discharge without a permit violates § 301(a). Id. § 1311(a). In the instant case, the Defendants, by virtue of the sidecasting of materials from the drainage ditch, discharged fill material into wetlands on the Parcel without a permit. The question presented is whether the wetlands on the Parcel are "waters of the United States."

The Corps' regulations interpreting the Act define "waters of the United States", in pertinent part, as waters, or tributaries of waters, which are used in interstate commerce, including all waters which are subject to the ebb and flow of the tide ("tidal waters"). 33 C.F.R. § 328.3(a)(1), (5). Also included in the definition of waters of the United States are wetlands adjacent to tidal or navigable waters or their tributaries. Id. § 328.3(a)(7). Section (b) of the regulations defines wetlands and section (c) defines "adjacent" as:

> [B]ordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are "adjacent wetlands."

Id. § 328.3(c).

In the Corrected M&O issued September 27, 1997, this Court held that the wetlands on the Deaton Parcel were waters of the United States within the meaning of the Act by virtue of being adjacent to navigable waters. Corrected M&O at 21. The Court stated:

> Ultimately, it is the surface water connection between the Deaton Parcel and the Chesapeake Bay that makes the discharge of pollutants into wetlands on the property a question of federal concern. It is this surface connection that makes any wetlands on the Deaton Property contiguous with, and therefore adjacent to, waters of the United States within the meaning of 33 C.F.R. § 328.3.

Id.

Defendants contend that the Supreme Court decision in SWANCC, 531 U.S. 159 (2001), restricting the Corps' jurisdiction under the Clean Water Act warrants reconsideration of this Court's previous determination that the Corps has jurisdiction over the Parcel. The Defendants also contend that the Fourth Circuit's decision in United States v. Wilson, 133 F.3d 251 (4th Cir. 1997), insofar as it refers to the jurisdictional issue, also requires reconsideration of this Court's decision. Finally, the Defendants contend that United States v. Morrison, 529 U.S. 598 (2000), casts doubt on the Constitutionality of the determination that the Corps has jurisdiction over the Parcel.

1. SWANCC

In SWANCC, the Supreme Court examined 33 C.F.R. § 328.3(a)(3) and the Migratory Bird Rule, 51 Fed. Reg.

41217 (1986). Section 328.3(a)(3) expands the definition of navigable waters under the Clean Water Act, in pertinent part, to include "[a]ll other waters such as intrastate lakes, rivers . . . [and] wetlands . . . , the use, degradation or destruction of which could affect interstate or, foreign commerce." Id. Pursuant to this provision, the Corps developed the Migratory Bird Rule, which further extended the definition of navigable waters to include intrastate waters used as habitat by migratory birds. 51 Fed. Reg. 41217.

In SWANCC, the Corps sought to exercise jurisdiction in reliance on this rule over wholly intrastate, isolated ponds frequented by migratory birds. 531 U.S. 159. The Supreme Court held that the Migratory Bird Rule exceeded the permissible reach of Congress' jurisdiction under the Commerce Clause. Id. at 174. Specifically, the SWANCC Court very narrowly held:

> 33 C.F.R. § 328.3 (a)(3)(1999), as clarified and applied to petitioner's balefill site pursuant to the 'Migratory Bird Rule,' 51 Fed. Reg. 41217 (1986), exceeds the authority granted to [the Corps] under § 404(a) of the CWA.

Id.

As the Defendants themselves point out, SWANCC addressed only § 328.3(a)(3). Defs.' Mem. Supp. Recons. at 11, n.9 ("Defs.' Mem."). Unlike SWANCC, jurisdiction over the Defendants' Parcel in the instant action is exercised pursuant to § 328.3 (a)(1), (5), and (7), (b), and (c), which state, in pertinent part:

> (a) The term "waters of the United States" means
> (1) All waters which are currently

> used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
>
> . . .
>
> (5) Tributaries of waters identified in paragraphs (a)(1)-(4) of this section;
>
> . . .
>
> (7) Wetlands adjacent to waters . . . identified in paragraphs (a)(1)-(6) of this section.
>
> (c) The term "adjacent" means bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are "adjacent wetlands."

33 C.F.R. § 328.3. The essence of the Defendants' argument seems to be their contention that the SWANCC determination regarding a § 328.3(a)(3) water could be made with respect to (a) (5) waters and (a) (7) wetlands. Defs.' Mem. at 11, n.9. However, neither the Supreme Court nor the Fourth Circuit has made such a determination.

Moreover, there is strong dicta in SWANCC suggesting the Supreme Court would not accept such an argument if presented with the question involved in the instant case. The SWANCC Court discussed in considerable detail the holding in United States v. Riverside Bayview Homes, 474 U.S. 121 (1985), a case in

which the Court held the Corps had jurisdiction over wetlands directly adjacent to a navigable waterway. SWANCC, 531 U.S. at 167. The Supreme Court in SWANCC noted both that it did not, in Riverside Bayview, address whether the Corps would have jurisdiction over wetlands not immediately adjacent to open water, and that it need not address this question in SWANCC because the isolated water at issue was in no way connected to navigable waters. While stating that Congress' jurisdiction under the Act was not without limits, the Court cited with approval its finding in Riverside Bayview that Congress intended a broader, though not limitless, construction than the literal meaning of the word "navigable". SWANCC, 531 U.S. at 171 (citing Riverside Bayview, 474 U.S. at 133).

The Court found that this construction could not be so broad as to include the wholly intrastate pond used by migratory birds but left open the question of whether it might include wetlands not directly adjacent to navigable waters. Id. at 170-71. As one federal district court interpreting SWANCC put it:

> SWANCC does not reach the question of whether, on a basis other than being visited by migratory birds, isolated wetlands may fall under the definition of navigable waters/waters of the United States. It makes clear that it is still the rule that a nonnavigable (in the traditional sense) wetland directly adjacent to a navigable body of water falls within the purview of the [Act], and that an isolated wetland being visited by migratory birds is not enough to bring the wetland within the purview of the [Act]. SWANCC does not clarify at what

> points between those two extremes a nonnavigable body of water falls within the [Act's] definition of navigable waters.

United States v. Krilich, 152 F.Supp.2d 983, 988 (N.D.Ill. 2001) (citations omitted). Regardless of where the dividing line between those two extremes will ultimately drawn, the SWANCC decision addresses only jurisdiction derived from 33 C.F.R. § 328.3 (a) (3), not § 328.3(a)(1), (5), and (7). Thus, SWANCC is not a change in decisional law with respect to jurisdiction in the instant action, and it therefore provides no basis for the Court to change its previous decision on jurisdiction.

Even if jurisdiction in this case were derived from § 328.3(a)(3), it is still not clear that SWANCC would amount to a change in decisional law. The Defendants broadly assert that SWANCC invalidated § 328.3(a)(3). Defs.' Mem. at 7. However, the narrow holding of SWANCC quoted above appears to invalidate only the Migratory Bird Rule (which was derived from § 328.3(a)(3)) rather than § 328.3(a)(3) itself.[2] Because there is a hydrologic connection between the Deaton wetlands and navigable waters, jurisdiction over the Defendants' Parcel would in no way depend on the Migratory Bird Rule.

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[2] There is no general consensus as to the status of § 328(a)(3) after SWANCC. See, e.g., Headwaters, Inc. v. Talent Irrigation Dist., 243 F.3d 526 (9th Cir. 2001) (SWANCC "invalidated a 1986 Army Corps of Engineers promulgation known as the 'Migratory Bird Rule'."); United States v. Buday, 138 F. Supp. 2d 1282, 1287 (D. Mont. 2001) ("Even though the [SWANCC] Court did not strike any part of 33 C.F.R. § 328 (a) (3), the decision raises serious questions about the continued viability of that subsection."); United States v. Interstate Gen. Co., 152 F. Supp. 2d 843, 846 (D. Md. 2001) (SWANCC essentially invalidated 33 C.F.R. § 328 (a) (3)).

Thus, the SWANCC Court's invalidation of the Rule would not control jurisdiction over the Deaton wetlands even if such jurisdiction were derived from 33 C.F.R. § 328.3 (a) (3). Again, as the Krilich court put it:

> To the extent there is a basis for the government to contend that the wetlands are not isolated, a colorable basis for [Clean Water Act] regulation continues to exist. Cases subsequent to SWANCC have not limited the definition of waters of the United States to those immediately adjacent to navigable (in the traditional sense) waters.

152 F.Supp.2d 983 at 992, n.13.

Indeed, the language used by the SWANCC Court indicates that it did not intend for the holding to have a broad reach. 531 U.S. 159. For example, in holding that the respondents had not presented evidence sufficient to support the validity of the Migratory Bird Rule, the Court stated that the respondents had produced no persuasive evidence "[b]eyond Congress' desire to regulate wetlands adjacent to 'navigable waters' . . . ". Id. at 170-71. Notably, the Court said neither directly abutting nor adjacent to open waters. The Supreme Court, well aware of the broader than literal meanings "adjacent" and "navigable" have under the Act, presumably would not have used such language had it intended its holding to restrict the Corps' jurisdiction under the Act to wetlands directly abutting open waters.

While there are no controlling cases interpreting SWANCC, other courts have declined to extend SWANCC beyond its narrow holding. For example, in United States v. Interstate Gen. Co., 152 F.Supp.2d 843

(D.Md. 2001), which is the latest incarnation of the Wilson case[3], a district court within the Fourth Circuit expressly declined to construe SWANCC as barring jurisdiction over wetlands very similar to those involved in the instant action. Like the Deatons, the Interstate defendants argued that SWANCC amounted to a change in controlling law requiring the court to reconsider whether the Corps had jurisdiction over their wetlands that were connected to the Potomac River by a six-mile network of streams and creeks. 152 F.Supp.2d at 846. The court found the defendants' reading of SWANCC overly broad and held:

> The SWANCC case is a narrow holding in that only 33 C.F.R. § 328(a)(3), as applied to the Corps creation of the Migratory Bird Rule, is invalid . . . . Because the Supreme Court reviewed only 33 C.F.R. § 328 (a)(3), it would be improper for this Court to extend the SWANCC Court's ruling any further than they clearly intended.

Id. at 847.

Other courts have taken a similarly narrow view of SWANCC. In United States v. Rueth Dev. Co., the defendants sought to modify a consent decree entered into following a determination that they violated the Clean Water Act by dredging without a permit on their non-tidal wetlands. No. 2:96-CV-540 (N.D.Ind. Sept. 25, 2001) (order, inter alia, denying motion to reconsider). Like the Deatons, the Rueth defendants argued in support of their motion for reconsideration that in light of SWANCC, the

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[3] After being resolved by a criminal guilty plea and a civil consent decree, Wilson is again on appeal before the Fourth Circuit sub nomine United States v. Interstate Gen. Co.

Corps lacked jurisdiction over their wetlands. Id. at 4. On facts very similar to the instant action, the Rueth court found that SWANCC did not constitute a change in decisional law because:

> There are two fundamental factual differences between Defendants' Site and the real property at issue in SWANCC. First, Defendants' Site is home to a natural wetland which flows into connecting bodies of water. In SWANCC, the bodies of water at issue were isolated mining pits and ponds. In other words, a molecule of water residing in one of these pits or ponds could not mix with molecules from other bodies of water. At Defendants' Site, however, water molecules currently present in the wetlands will inevitably flow towards and mix with water from connecting [navigable waters]. Secondly, the "Migratory Bird Rule" was the sole basis of regulatory jurisdiction asserted by the [Corps] in SWANCC. With respect to the Defendants' site, however, the government has never invoked the Migratory Bird Rule. Instead, the government seeks to regulate the Site on the theory that it is an "adjacent wetland."

Id.

In United States v. Buday, 138 F.Supp.2d 1282 (D.Mont. 2001), the court, post-SWANCC, upheld the defendant's Clean Water Act conviction where jurisdiction was exercised over his discharge of pollutants into wetlands adjacent to tributaries of navigable waters pursuant to 33 C.F.R. § 328 (a) (1), (5), and (7). The court

noted that Congress could exercise its Commerce Clause power under these subsections because they relate directly to navigability, and that it was the absence of this connection to a channel of interstate commerce that concerned the SWANCC Court. 138 F.Supp.2d at 1288. Accordingly, the Buday court found permissible the Corps' exercise of jurisdiction over the defendant's wetlands, even though they were not connected to a navigable waterway for more than 235 miles, because the pollutants would eventually reach waters affecting interstate commerce. Id. at 1292. In fact, the court went so far as to say:

> [A]ny polluting activity is subject to federal jurisdiction if it impinges on any stream that flows primarily over the surface of the land and empties into a water that is at some point navigable-in-fact. . . . The legislative history, in combination with the cases cited, establishes that Congress intended the Clean Water Act to reach any surface water that contributes to a water that is navigable-in-fact.

Id. at 1289-90.

In Headwaters, Inc. et al. v. Talent Irrigation Dist., the Ninth Circuit found SWANCC inapplicable to the exercise of jurisdiction over irrigation canals which, at least intermittently, exchanged water with streams and creeks. 243 F.3d 526 (9th Cir. 2001). The court refused to extend SWANCC, stating "[t]he irrigation canals in this case are not 'isolated waters' such as those that the [SWANCC] Court concluded were outside the jurisdiction of the Clean Water Act." Id. at 533. The court held that

"[e]ven tributaries that flow intermittently are 'waters of the United States'." Id. at 534.

In support of its holding, the Headwaters court cited United States v. Eidson, the reasoning of which persuaded this Court when it originally found the Deaton Parcel contained jurisdictional wetlands under the Act. Headwaters, 243 F.3d 526, 534 (citing Eidson, 108 F.3d 1336, 1342 (11th Cir. 1997); Corrected M&O at 19-20. In Eidson, the Eleventh Circuit held that a drainage ditch connected to a sewer drain that ran into a canal and eventually led to Tampa Bay was a "water of the United States" under the Act. 108 F.3d at 1342-43. This Court, like the Ninth Circuit and other courts[4], does not agree with the Defendants' conclusion that the reasoning of Eidson and other cases finding jurisdiction over waters not immediately adjacent to navigable waters is called into question by SWANCC.

Unlike the situation with the isolated pond at issue in SWANCC, there is a surface water connection, albeit indirect, between the Deaton Parcel and navigable waters,

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[4] The Headwaters court cites, in further support of its holding, several other pre-SWANCC cases: "[S]ee Driscoll v. Adams, 181 F.3d 1285, 1291 (11th Cir. 1999) (small-volume stream running only intermittently is 'navigable water'); Quivira Mining Co. v. United States Envtl. Prot. Agency, 765 F.2d 126, 130 (10th Cir. 1985) (creeks and arroyos connected to streams during intense rainfall are 'waters of the United States'); [United States v.] Texas Pipe Line Co., 611 F.2d [345, 347 (10th Cir. 1979)] (oil spill into tributary involved 'waters of the United States,' even though there was no evidence that streams that connected the tributary with navigable waters were running at time of spill) . . .". 243 F.3d at 534. Thus, the Ninth Circuit reads SWANCC as limited to its narrow holding and does not regard it as a dramatic curtailing of Corps jurisdiction under the Act.

which was demonstrated in a dye study conducted by Corps ecologist Alex Dolgos. See 2nd Stipulation ¶¶ 5-14; 1st Dolgos Aff. ¶ 6. Like the wetlands in Rueth, "water molecules currently present in the [Deaton] wetlands will inevitably flow towards and mix with water from connecting" navigable waters. No. 2:96-CV-540 at 4. The Defendants' sidecasting activities on their wetlands impinged on water that "flows primarily over the surface of the land and empties into a water that is at some point navigable-in-fact", a fact which was sufficient to convince the Buday court that the defendant's wetlands were subject to regulation under the Act. 138 F.Supp.2d at 1289-90; 1st Dolgos Aff. ¶¶ 2, 4-6, 9. Similarly, this Court's determination that the Corps has jurisdiction over the Parcel was premised on the Parcel's surface water connection, or "adjacency", to the Wicomico River and, ultimately, the Chesapeake Bay. Corrected M&O at 21.

The Defendants contend that their wetlands are not adjacent to waters of the United States because of the roadside drainage ditch immediately adjacent to their wetlands. They claim that the ditch cannot be considered a tributary of any sort but argue that even assuming it is, it is only a tributary of the kind of water described in the now limited § 328.3(a)(3). While the Court agrees that the Defendants' wetlands cannot be considered adjacent to navigable waters according to the plain meaning of "adjacent", the foregoing discussion of the Clean Water Act regulations and interpreting cases makes clear that "adjacent" is not to be restricted to its plain general usage meaning in the context of the Act. If "[w]etlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are 'adjacent wetlands'" wetlands, such as those on the Defendants' Parcel, having an actual surface water connection to navigable waters are "adjacent" within the

meaning of the Act. 33 C.F.R. § 328.3(c) (emphasis added).

The Defendants' continued reliance on the "questionable" status of § 328.3(a)(3) is misplaced. It is the surface water connection between the Defendants' wetlands and navigable waters that renders the wetlands "waters of the United States" under the Act by virtue of §§ 328.3 (a)(1), (5), and (7) and § 328.3(c) and thereby gives the Corps jurisdiction in the instant action. Because these provisions are not called into question by SWANCC, the Court will not change its decision on jurisdiction.

2. Wilson

In Wilson, the Fourth Circuit held that 33 C.F.R. § 328.3 (a)(3), which adds to the definition of "waters of the United States" intrastate waters whose degradation could affect interstate commerce, exceeded the Corps' congressional authority to regulate under the Clean Water Act. 133 F.3d 251, 253-54. The Wilson court invalidated the provision because it does not require that the use of the intrastate waters have a substantial impact on interstate commerce or that the covered waters have any sort of nexus with interstate or navigable waters. 133 F.3d at 257. Rather, it triggers Corps jurisdiction if the activity to be regulated merely could affect interstate or foreign commerce. 33 C.F.R. § 328 (a)(3) .

As discussed above, jurisdiction over the Defendants' wetlands is conferred by § 328.3 (a)(1), (5), and (7). The Wilson court's Constitutional concern does not apply to § 328.3 (a)(1), (5), and (7), which, as detailed below, confer jurisdiction pursuant to Congress' authority to regulate channels of interstate commerce. In fact, the Wilson court noted that:

> Presumably, Congress may also regulate the discharge of pollutants into nonnavigable waters to the extent necessary to protect the use or potential use of navigable waters as channels or instrumentalities of interstate commerce, although the extent of that power is not entirely clear.

133 F.3d at 256. Yet the Wilson court specifically declined to answer the very question the Defendants present to this Court. Instead, the Fourth Circuit was careful to circumscribe its decision to construing only § 328.3 (a)(3):

> [W]e need not resolve these difficult questions about the extent and limits of congressional power to regulate nonnavigable waters to resolve the issue before us. The regulation challenged here, 33 C.F.R. 328.3(a)(3) (1993), defines "waters of the United States" to include: All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mud flats, sand flats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce . . . . The regulation requires neither that the regulated activity have a substantial effect on interstate commerce, nor that the covered waters have any sort of nexus with navigable, or even interstate, waters.

Wilson at 256-57. In contrast, the regulations conferring jurisdiction over the Parcel wetlands require just such a

nexus, namely "adjacency", between the wetlands and navigable or tidal waters, i.e. channels of interstate commerce. See 33 C.F.R. § 328.3(a)(1), (5), (7). Thus, Wilson is not controlling decisional law with respect to jurisdiction in the instant action.

The Defendants seek to extend Wilson's holding to the present case because the facts (the type of wetlands and their proximity to navigable waters) of the two cases are very similar.[5] However, the similarity of the facts does not render Wilson controlling decisional law in the instant action. Wilson therefore provides no basis for the Court to reconsider its previous finding of jurisdiction.[6]

3. Morrison

The Corps' jurisdiction under the Clean Water Act derives from Congress' power to regulate interstate commerce under the Commerce Clause. U.S. Const. art. I, § 8. The Defendants contend that the Supreme Court's modern curtailment of Congress' Commerce Clause powers, beginning with United States v. Lopez, 514 U.S. 549 (1995), and recently clarified by United States v. Morrison, 529 U.S. 598 (2000), renders unconstitutional the Corps' attempt to regulate activity on wetlands that will not have a substantial economic impact on interstate

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[5] The parcels in Wilson contained wetlands, the waters from which "flowed in a drainage pattern through ditches, intermittent streams, and creeks, ultimately joining the Potomac River, a tributary of the Chesapeake Bay." 133 F.3d at 254-55.

[6] The SWANCC Court took a narrower approach than the Fourth Circuit, invalidating only the Migratory Bird Rule and not § 328.3(a)(3) in its entirety, so query whether this aspect of Wilson remains good law in the aftermath of SWANCC. See supra n.2 and accompanying text.

commerce.

In Lopez, the Supreme Court outlined the modern scope of Congress' commerce clause power as follows:

> [There are] three broad categories of activity that Congress may regulate under its commerce power. First, Congress may regulate the use of the channels of interstate commerce ["Prong 1"]. Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities ["Prong 2"]. Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, i.e., those activities that substantially affect interstate commerce ["Prong 3"].

514 U.S. at 558-559 (citations omitted). Prong 3 jurisdiction may be exercised over purely intrastate activities which individually do not effect interstate commerce, but, in the aggregate, the class of activities has a substantial impact on interstate commerce. See Wickard v. Filburn, 317 U.S. 111 (1942). Short of stating that Prong 3 jurisdiction applies only to economic activities, the Morrison Court emphasized the importance of focusing on economic endeavors when aggregating activities to determine whether Prong 3 jurisdiction exists. 529 U.S. at 608-611.

Pursuant to the authority to regulate intrastate activities whose cumulative impact affects interstate commerce, the Corps enacted Clean Water Act regulation

33 C.F.R. § 328(3)(a)(3), which extends the definition of "waters of the United States" under the Act to include:

> All other waters such as intrastate lakes, rivers . . . or naturals ponds, the use, degradation or destruction of which could affect interstate or foreign commerce . . . .

Id. As § 328.3(a)(3) confers jurisdiction over intrastate waters to the extent that the use of such waters could affect interstate commerce, it clearly derives the kind of Commerce Clause jurisdiction described by Lopez Prong 3. 514 U.S. at 558-559.

The Defendants correctly assert that the SWANCC, Court found that the Migratory Bird Rule exceeded the scope of what Congress may regulate under Lopez Prong 3. SWANCC, 531 U.S. 159, 174. However, jurisdiction is exercised in the instant action under § 328.3 (a)(1), (5), and (7), which derive authority to confer jurisdiction from Lopez Prong 1, i.e. wetlands adjacent to tributaries of channels of interstate commerce. Thus, the Defendants' contention that the sidecasting they conducted on their wetlands did not have a substantial economic impact on interstate commerce, regardless of its merit, is irrelevant to the instant decision. Because Morrison focuses exclusively on Lopez Prong 3 jurisdiction, it is not applicable to this case. 529 U.S. 598. The Constitutional arguments raised by the Defendants thereunder need not and will not be reached.

In sum, while Supreme Court and the Fourth Circuit decisions are certainly controlling over this Court, the precedents established by SWANCC, Wilson, and Morrison cannot be construed as controlling decisional law in the instant case. Thus, the Defendants' Motion for Reconsideration presents no reason to change the decision

or modify the rationale of the Court's September 22, 1997 Memorandum and Order.

III. REMEDY AND PENALTY

A. Remedy

After inspecting the Parcel, the Court finds that the appropriate remedy is to require the Defendants to restore the status quo prior to the offense by replacing the excavated material in the drainage ditch. The Court finds unacceptable the Defendants' proposal that they be permitted to remove the sidecast material from the Parcel. It is doubtful that this removal could be done in an ecologically harmless manner. Even if it could, the net effect of such a "remedy" would be to reward the Defendants with Court sanctioned drainage of protected wetlands and permanent disruption of the environmental status quo.

The Government, in its October 18, 2001 Brief Following Site Visit, states that an ecologically acceptable alternative to refilling the entire ditch on the Parcel would be to order the Defendants only to: 1) backfill fifty to seventy-five feet beginning at Morris Leonard Road; and 2) backfill fifty to seventy-five feet at the point where water coming off the Parker Property enters the Deaton ditch. If this possibility is less burdensome on the Defendants yet does no ecological harm, it will be permitted; however, the Court will not open the door to further litigation. The Court will, therefore, provide in its Order that it will entertain a joint motion to modify the Order so as to permit the Government's suggestion to be effected.

B. Penalty

The Government is, quite appropriately, concerned about the action of the Defendants and the effects upon the environment. Moreover, it is true that, in cases like this one, substantial penalties should be imposed as a deterrent to others who may take their chances on getting caught. Nevertheless, the critical point in the instant case is that the Defendants had a perfectly reasonable argument in support of their position that their actions did not contitute a violation of the Clean Water Act. Indeed, Judge Niemeyer of the Fourth Circuit expressly so held in his decision in Wilson and this Court (while disagreeing with Judge Niemeyer) predicted that the Fourth Circuit would adopt the Defendants' position.

In context, and in recognition of the fact that the Defendants are required to bear the expense of restoring the Parcel to its pre-violation condition, the Court will not impose a penalty on the Defendants.

IV. CONCLUSION

For the foregoing reasons:

1. Defendants' Motion for Reconsideration of the Court's September 22, 1997 decision is DENIED.
2. The Judgment Order issued on September 22, 1997, insofar as it resolves the jurisdictional issue in this matter, remains in effect.
3. The Court shall require, by separate Order, that the Defendants replace the excavated material in the drainage ditch.
4. The Court shall not impose a financial penalty on the Defendants.

5. Judgment shall be entered by separate Order.

SO ORDERED this 29th day of January, 2002.

/s/ Marvin J. Garbis
Marvin J. Garbis
United States Distict Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

UNITED STATES OF AMERICA	*	
Plaintiff	*	
vs.	*	
JAMES S. DEATON AND	*	CIVIL NO. MJG 95-2140
REBECCA DEATON	*	
Defendants.	*	

...o0o...

REMEDIAL ORDER

For the reasons set forth in the Memorandum and Order issued January 29, 2002:

1. Defendants James S. Deaton and Rebecca Deaton shall restore the property at issue, Parcel 117 on Wicomico County Tax Map 31, to its pre-violation condition and elevation by replacing in the drainage ditch thereon the material which was removed and sidecast on the said property by them and/or their agents;

2. This restoration shall be accomplished with all reasonable expedition but in no event later than 6 months from the effective date of this ORDER and, subject to the approval of the Army Corps of Engineers, in compliance with all pertinent legal and regulatory requires, which approval shall not be unreasonably withheld;

3. Work pursuant to this ORDER may include cutting trees which have grown up on the spoil piles and planting annual rye for stabilization, as necessary.

SO ORDERED This 4th day of February 2002.

/s/ Marvin J. Garbis
Marvin J. Garbis
United States District Court Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
August 11, 2003

No. 02-1442
CA-95-2140-MJG

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JAMES S. DEATON; REBECCA DEATON,
Defendants-Appellants,

THE CHESAPEAKE BAY FOUNDATION, INCORPORATED; STATE OF MARYLAND, DEPARTMENT OF THE ENVIRONMENT,
Amici Supporting Appellee.

On Petition for Rehearing and Rehearing En Banc

The appellant's petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

For the Court,
/s/ Patricia S. Connor
Clerk

APPENDIX E

I. Pertinent Provisions of the Clean Water Act.

(33 U.S.C.A. §§ 1251 to 1387)
CHAPTER 26-WATER POLLUTION PREVENTION AND CONTROL

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* * *

§ 101(a), (b), 33 U.S.C. § 1251(a), (b) (2003)

(a) Restoration and maintenance of chemical, physical and biological integrity of Nation's waters; national goals for achievement of objective

The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. In order to achieve this objective it is hereby declared that, consistent with the provisions of this chapter--

(1) it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985;

(2) it is the national goal that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983;

(3) it is the national policy that the discharge of toxic

pollutants in toxic amounts be prohibited;

(4) it is the national policy that Federal financial assistance be provided to construct publicly owned waste treatment works;

(5) it is the national policy that areawide waste treatment management planning processes be developed and implemented to assure adequate control of sources of pollutants in each State;

(6) it is the national policy that a major research and demonstration effort be made to develop technology necessary to eliminate the discharge of pollutants into the navigable waters, waters of the contiguous zone, and the oceans; and

(7) it is the national policy that programs for the control of nonpoint sources of pollution be developed and implemented in an expeditious manner so as to enable the goals of this chapter to be met through the control of both point and nonpoint sources of pollution.

Congressional declaration of goals and policy
(b) Congressional recognition, preservation, and protection of primary responsibilities and rights of States

It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter. It is the policy of Congress that the States manage the construction grant program under this chapter and implement the permit programs under sections 1342 and 1344 of this title. It is further the

policy of the Congress to support and aid research relating to the prevention, reduction, and elimination of pollution, and to provide Federal technical services and financial aid to State and interstate agencies and municipalities in connection with the prevention, reduction, and elimination of pollution.

* * *

§ 301(a), 33 U.S.C. § 1311(a) (2003)

Effluent limitations

(a) Illegality of pollutant discharges except in compliance with law

Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.

* * *

§ 404(a), 33 U.S.C. § 1344(a) (2003)

Permits for dredged or fill material

(a) Discharge into navigable waters at specified disposal sites

The Secretary may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites. Not later than the fifteenth day after the date an applicant submits all the information required to complete an application for a permit under this subsection, the Secretary shall publish the notice required by this subsection.

* * *

§ 502(6), (7), (12), (14), 33 U.S.C. § 1362(6), (7), (12), (14) (2003)

Definitions

Except as otherwise specifically provided, when used in this chapter:

(6) The term "pollutant" means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water. This term does not mean (A) "sewage from vessels or a discharge incidental to the normal operation of a vessel of the Armed Forces" within the meaning of section 1322 of this title; or (B) water, gas, or other material which is injected into a well to facilitate production of oil or gas, or water derived in association with oil or gas production and disposed of in a well, if the well used either to facilitate production or for disposal purposes is approved by authority of the State in which the well is located, and if such State determines that such injection or disposal will not result in the degradation of ground or surface water resources.

• • •

(7) The term "navigable waters" means the waters of the United States, including the territorial seas.

• • •

(12) The term "discharge of a pollutant" and the term "discharge of pollutants" each means (A) any addition of any pollutant to navigable waters from any point source, (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft.

• • •

(14) The term "point source" means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well,

discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.

* * *

II. Pertinent Federal Regulations

33 C.F.R. § 328.3 (a), (c) (2003)

Definitions

For the purpose of this regulation these terms are defined as follows:

(a) The term "waters of the United States" means

(1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(2) All interstate waters including interstate wetlands;

(3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:

i. Which are or could be used by interstate or foreign travelers for recreational or other purposes; or

ii. From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

iii. Which are used or could be used for industrial purpose by industries in interstate commerce;

(4) All impoundments of waters otherwise defined as waters of the United States under the definition;

(5) Tributaries of waters identified in paragraphs (a)(1)-(4) of this section;

(6) The territorial seas;

(7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a)(1)-(6) of this section.

(8) Waters of the United States do not include prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with the EPA.

Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 CFR 123.11(m) which also meet the criteria of this definition) are not waters of the United States.

• • •

(c) The term "adjacent" means bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are "adjacent wetlands."

33 C.F.R. § 328.4 (2003)

Limits of jurisdiction.

(a) Territorial Seas. The limit of jurisdiction in the territorial seas is measured from the baseline in a seaward direction a distance of three nautical miles.

(b) Tidal Waters of the United States. The landward limits of jurisdiction in tidal waters:

(1) Extends to the high tide line, or

(2) When adjacent non-tidal waters of the United States are present, the jurisdiction extends to the limits identified in paragraph (c) of this section.

(c) Non-Tidal Waters of the United States. The limits of jurisdiction in non-tidal waters:

(1) In the absence of adjacent wetlands, the jurisdiction extends to the ordinary high water mark, or

(2) When adjacent wetlands are present, the jurisdiction extends beyond the ordinary high water mark to the limit of the adjacent wetlands.

(3) When the water of the United States consists only of wetlands the jurisdiction extends to the limit of the wetland.

* * *

APPENDIX F

I. Pertinent Articles of the Maryland Code

Article 8. Soil Conservation

Section 603(b). Agricultural drainage projects.

The General Assembly determines and finds that the lands and waters comprising the watersheds of the State are great natural assets and resources. It continues to find that the drainage of surface waters from lands for agricultural purposes by public drainage associations represents a public benefit. The General Assembly further finds that agricultural drainage projects, if not properly designed, operated, and maintained, have the potential to contribute nonpoint source pollutants to the waters of the State.

* * *

Article 25. County Commissioners Draining Lands

Section 52. Establishment of Public Drainage Associations. (a) The boards of county commissioners of the several counties in the State of Maryland shall have jurisdiction, power, and authority to establish public drainage associations in their respective counties, and to locate and establish ditches, drains, or canals, and to cause to be constructed, straightened, widened or deepened any ditch, drain or watercourse for the purpose of establishing and maintaining watershed drainage systems, and it is hereby declared that such drainage shall be considered a public benefit and conducive to the public health, convenience and welfare.

(b) The State Secretary of Agriculture and the State Soil Conservation Committee shall be notified of any establishment of a drainage association so that coordination and assistance may be provided in accordance with § 8-602 of the Agriculture Article.

(c) The provisions of this subtitle apply in those counties having a charter form of government under Article XI-A of the Constitution, with the term "county council" being

substituted in each instance in this subtitle for the term "county commissioners". The provisions of this subtitle apply in those counties having adopted code home rule under Article XI-F of the Constitution.

(d) The provisions of this subtitle do not restrict a chartered or code county from exercising those powers granted in Article 25A, § 5(G) of the Code and Article 25B, § 13 of the Code, which do not conflict with this subtitle.

Section 53. Petition to establish. (a) A petition signed by not less than one third of the landowners or by the owners of not less than one third of the land in a watershed may be filed with the clerk of the board of county commissioners of the county in which all or any part of such body of land is located, describing the area in such a way as to convey an intelligent idea of its location, boundaries and the need of drainage for optimal crop production and that the public benefit or utility, or the public health, convenience or welfare would be promoted by draining or ditching the same, or by changing or improving the natural watercourses, and asking for the establishment of a public drainage association for such purposes.

(b) The petition shall be accompanied by a report from the local soil conservation district or districts lying in whole or in part within the proposed association which shall show the following:

(1) The size and location of the proposed drainage association;

(2) The nature of the problem;

(3) The type of treatment believed needed and the benefits anticipated;

(4) Whether the proposed public drainage association is practicable and feasible and is generally supported by the landowners in the area;
(5) Whether it will promote the public benefit, and be conducive to the public health, safety, and welfare;
(6) The name of the proposed organization shall be styled the "_____ Public Drainage Association"; and
(7) The number of managers, not less than three to serve as the governing body.

The soil conservation district or districts shall file, with the report, maps, which shall show a general delineation of area affected, together with its location in the county or counties indicated.

* * *

II. Pertinent Maryland Regulations

Title 15. Section 20.01.01.

These regulations establish the requirements for the design, construction, operation, and maintenance of agricultural drainage projects that are financed or managed by public drainage associations. To the maximum extent practicable, these regulations assure protection of natural resources and prevent water pollution by non-point source pollutants associated with agricultural drainage projects.

* * *

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

UNITED STATES OF AMERICA	:	
Plaintiff	:	
vs.	:	CIVIL ACTION NO. MJG-95-2140
JAMES S. DEATON, et al.	:	
Defendants	:	

...oOo...

SIXTH AFFIDAVIT OF ALEXANDER G. DOLGOS

I, Alexander G. Dolgos, being duly sworn, do state as follows:

1. I am an Ecologist employed in the United States Army Corps of Engineers, Baltimore District, assigned to the Eastern Shore Enforcement Office. I have previously provided affidavits in this case and incorporate my qualifications from those prior affidavits as if stated herein.

2. At the suggestion of Mr. Smethurst, I am filing this affidavit to authenticate photographs taken during the dye test done in May 1996.

3. In my first affidavit I described the dye test in this case as follows:

> On May 18, 1996, another authorized entry on the Deaton property was made. The purpose of this entry was to dye trace the flow of the stream located on the property. I was assisted by Jerry Crutchly, an Environmental Protection Specialist with EPA Region III, and Doug Parker, Special Agent EPA CID.
>
> At 8:18 a.m., Mr. Crutchly placed non-toxic

tracing dye in the headwater stream at the location of well number 20, as depicted on the May 17, 1996 site survey plan. See Attachment 15, Defendants Site Survey Plan. Well #20 is located upstream of the unauthorized work. The dye was followed by visual observation and was photographed. Additional dye was added to the plume as necessary to maintain a detectable level for observations and photography.

The dye plume flowed downstream reaching the confluence with the manmade ditch at 9:47 a.m. The flow and dye continued downstream in the ditch and flowed under Morris Leonard Road through the existing culvert at 10:24 a.m. The plume continued downstream along the western side of Morris Leonard Road in a northerly direction. This stream channel is now part of the Public Draining Association (PDA). At 12:17 p.m., the plume reached the point were the channel turns west away from the road and flows across the agricultural fields. At 1:24 p.m., the plume reached the point where the Perdue Creek channel turns back in a northern direction. The plume continued downstream reaching the Beaver Dam Creek at 4:16 p.m. Beaver Dam Creek flows directly into the Wicomico River, a tidal tributary of the Chesapeake Bay. The stream flowed the entire length of Perdue Creek within the banks of a defined channel.

Review of other documents and photographs indicates that this dye test was actually performed on May 17, 1996.

4. The attached photographs, numbered 40- 54, were taken during the aforementioned dye test, at the

approximate locations indicated on the maps attached as Attachments 1 and 2. These photographs are fair and accurate depictions of the dye test as it appeared on May 17, 1996. On these same maps, Attachments 1 and 2, I have also indicated the approximate location of the photographs numbered 1-33, which photographs are attached to the Second Stipulation.

I hereby swear under penalty of perjury that the foregoing is true and correct, this 16th day of October 2001.

[ATTACHED EXHIBITS NOT REPRODUCED]

/s/ Alex G. Dolgos
Alexander G. Dolgos

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

UNITED STATES OF AMERICA	:	
Plaintiff	:	
v.	:	CIVIL NO. MJG-95-2140
JAMES S. DEATON AND REBECCA DEATON,	:	
Defendants.	:	

...oOo...

SECOND STIPULATION

The Parties to the above matter, in an effort to resolve factual disputes so that a final judgment may be entered, hereby agree and stipulate to the following facts in this case:

1. For the purposes of this stipulation (and without prejudice to Defendants' appellate rights) the parties accept the Court's prior rulings on the definitions of "saturated to the surface" and "growing season." For the purposes of this stipulation, the expression "shallow groundwater" means water within 12 inches of the surface. Since the parties do not agree on whether certain water filled depressions are "ditches", "channels", "watercourses" or "streams", this stipulation will use these terms interchangeably to describe any water filled depression containing flowing water for at least part of the year.

2. The Delmarva peninsula (incorporating Delaware and the eastern shores of Maryland and Virginia) exhibits a low, flat topography. In many areas, including within the

conditionally stipulated wetlands Deaton property[1], shallow groundwater on the peninsula rises and falls in a predictable seasonal pattern, rising to or close to the surface in the late Winter (January-February) and then falling off to lower levels in the late Spring through the Fall. When adjacent, some of this shallow ground water discharges into nearby ditches or streams.

3. The ditches/ channels along Morris Leonard Road have been there since at least the 1940's and probably were constructed when Morris Leonard Road was a dirt road. The Beaverdam Public Drainage Association (PDA) was not formed until the late 1960's. Prior to that time agricultural ditching in the area was part of an effort to drain farm fields and lower the groundwater table. Such ditching and draining was necessary in some areas because the soil conditions were sometimes too wet in the Spring for the planting or cultivating of crops.

4. Surface water and shallow ground water flows down gradient from the Parker property to the Deaton property. The source of the surface water flowing onto the Deaton property is a combination of groundwater and rainwater. This surface flow varies with fluctuations in annual and seasonal groundwater and rainfall, with greater frequency and volume generally occurring in the period from January to May. The relative contributions to this surface flow from shallow groundwater or rainfall also varies with groundwater levels and rainfall.

5. Prior to the construction of the ditch excavated by the Deatons in 1990 (the "Deaton Ditch"), this surface and shallow groundwater flowing onto the Deaton property

---

[1] The Parties have conditionally stipulated that the area between the ponded area and Morris Leonard Road was a wetland as described in the Attachment to the First Stipulation.

moved down gradient across the Deaton Property toward Morris Leonard Road. In the winter months, some of it ponded in a low area in the middle of the property. Some of it may have discharged down gradient into the roadside ditch either as shallow groundwater or sheet flow from the ponded area.

6. The roadside ditch along Morris Leonard Road has a defined bed and bank for most of its length.

7. The drainage ditch along Morris Leonard Road begins near Parsonsburg, approximately 2,350 feet to the southeast of the western corner the Deaton Property and the bend in Morris Leonard Road. At this point, it is not really a ditch but rather a shallow (6" - 8") swale that is not more that two feet wide. The "ditch" proceeds in a northwesterly direction getting slightly deeper and wider. At the property of Gary Nock (Parcel 423), it is perhaps three feet wide. Halfway across the Nock lot it enters a buried 14-inch culvert which continues across the balance of the Nock lot and across the developed portion of the Alfred Scrivo lot (Parcel 37). At the terminus of the culvert, the ditch is about four feet wide and when observed on October 22, 1996 by John Andrews, contained water having a depth of three inches.

8. As the ditch passes in front of the Deaton property (Parcel 117), it has a bottom width of two - three feet and when observed on October 22, 1996 by John Andrews a water depth of three-to-four inches.

9. Surface water from the Parker Property flows approximately 200 feet through an area containing wetland ferns and trees and into a 100-foot long, old, degraded man-made ditch approximately 1 foot deep and 1 foot wide which continues in a wetland swale down gradient to the Deaton property. This flow continues on the Deaton

property via swale down-slope approximately 400 feet from the Deaton property boundary until it is intercepted by the ditch the Deatons excavated in 1990, and then flows west and then south to join the ditch described in paragraphs 7 and 8.

10. Water from both ditches flows through an 18-inch, metal culvert under Morris Leonard Road to a county roadside drainage ditch adjacent to the John Adkins farm (parcel 5) having a bottom width of 3.5 feet and, when observed on October 22, 1996 by John Andrews, a water depth of 4-7 inches. The ditch continues around a turn in Morris Leonard Road where it empties into a larger ditch with a bottom width of 5.5 feet identified as the John Adkins Prong of the Beaverdam PDA. The PDA ditch continues for about 1700 feet along the southerly side of Morris Leonard Road (having a water depth 4-7 inches on October 22, 1996) until it reaches a point about 700 feet west of the entrance lane to John Adkins farm.

11. There the ditch turns 90 degrees and passes through farm fields belonging to Mr. Adkins. The ditch becomes wider and deeper after it again turns 90 degrees to the west and eventually crosses the John Speake and Lewis Riley farms. At the point where it crosses under the private dirt road running from Morris Leonard Road south through the Speake and Riley farms to Maryland Route 376 (Old Ocean City Road) it is 12 feet wide and approximately 8-10 feet deep, although the water depth when observed on October 22, 1996 by John Andrews was nine inches. From there it continues with approximately the same dimensions until it empties into Beaverdam Creek approximately 1320 feet to the west.

12. Beaverdam Creek is a naturally occurring, perennial, non-navigable stream that begins northwest of Parsonsburg just south of Dagsboro Road and flows in a

south-southwesterly direction under Morris Leonard Road, intersects Perdue Creek, and crosses under Old Ocean City Road (Md. Route. 346), Walston Switch Road and U. S. Route 50. The portion of the creek from just above Morris Leonard Road to just south of Md. Route 346 was channelized in the late 1960's as part of the Beaverdam PDA project.

13. After passing under U. S. Route 50, Beaverdam Creek continues to flow in a southwesterly direction until it reaches the dam at Hobbs Road where there is a privately owned and maintained pond. The creek crosses under Hobbs Road and Mt. Herman Road (Md. Route 350) and discharges into Parker Pond. The water in Parker Pond flows over the dam at North Schumaker Drive. From there water flows westerly to Shumaker Pond and the dam at Beaglin Park Drive owned and maintained by the City of Salisbury. From there, water flows northwesterly through Salisbury's municipal park and zoo to a city-maintained dam at Beaverdam Drive. Below the dam, the watercourse, although non-tidal, is known as the East Branch of the Wicomico River, and it flows westerly to a dam on the east side of Snow Hill Road (Md. Route 12).

14. Below the last-mentioned dam, the Wicomico River is tidal and, west of Business U. S. Route 13, navigable in fact. Approximately 25 miles downstream, the river empties into Tangier Sound and the Chesapeake Bay.

15. Perdue Creek is a naturally occurring stream. It is shown as an intermittent stream crossing Morris Leonard Road on the 1942 (Rev. 1946) and 1983 U.S.G.S. quadrangle maps of the area; approximately 3/4 mile downstream from Morris Leonard Road, Perdue Creek is depicted as a blue line (perennial) stream. On the 1905 and 1992 U.S.G.S. quadrangle maps of the area, Perdue Creek is depicted as an blue line (perennial) stream crossing

Morris Leonard Road.

16. Beaverdam Creek is a naturally occurring stream that is depicted on the 1905, 1942 (Rev. 1946), 1983 and 1992 U.S.G.S. quadrangle maps as a perennial (blue line) stream at the point that Perdue Creek enters.

17. The 1942 (Rev. 1946) and 1983 U.S.G.S. quadrangle maps of the area depict an intermittent stream flowing through the Deaton Property; the 1905 and the 1992 U.S.G.S. maps do not.

18. The differences in the way stream heads are depicted on these U.S.G.S. maps may be the result of several mapping conventions and policies. To begin with, stream classification features on U.S.G.S. maps are based on subjective criteria and limited observations. No scientific measurements are made to classify streams or intermittent streams drawn on U.S.G.S. maps. The U.S.G.S. maps do not purport to identify "waters of the United States", jurisdictional wetlands or all surface water connections between wetlands and downstream waters. Actual wet areas may be greater than those shown on these maps because USGS generally maps these areas based on the driest season of the year.

19. Newer U.S.G.S. mapping policies and standards adopted in 1973 and 1980 exclude first-order, intermittent streams of less than 2,500 ft. in length. The 1983 U.S.G.S. map was "photorevised" from the 1942 map to update cultural features, such as buildings and roads, and did not redraw physical features such as streams. Therefore, the new mapping policies and standards in effect in 1983 would not have affected the appearance of streams on the 1983 U.S.G.S. map (i.e. the existing stream lines would simply be recopied onto the new map). However, the 1992 map would reflect the 1973 and 1980 policy changes. The

result is that if there was an intermittent stream on the Deaton property it would not be reflected on the 1992 U.S.G.S. map.

20. Attached to and made a part of this stipulation are the following:

A. Photographs numbered 1 through 33 most of which were taken on September 14, 2001, the date of the Court's site visit.

B. Index To Photographs describing each of the 33 photographs.

C. Map from the Salisbury Chamber of Commerce on which are indicated the points at which photographs 11-33 were taken.

D. Map showing the general locations described in paragraphs 7 through 16 of this stipulation.

DATED this 12th day of October, 2001.

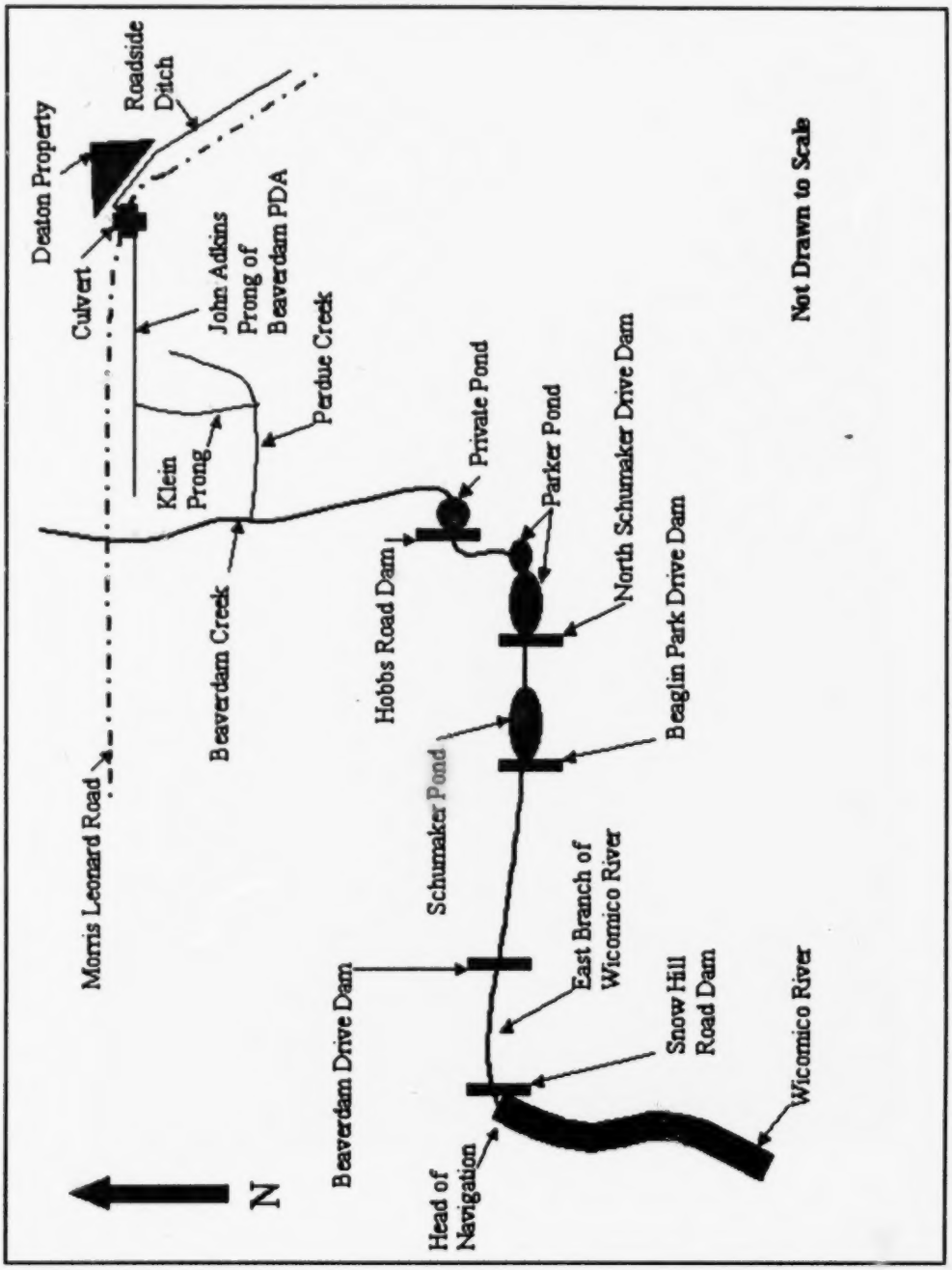
/s/ James C. Howard
James C. Howard
Assistant United States Attorney

/s/ Raymond S. Smethurst, Jr.
Raymond S. Smethurst, Jr.
Attorney For Defendants

[ATTACHED EXHIBITS NOT REPRODUCED]

APPENDIX I

Depiction of Connections between Deaton Property and Wicomico River, from Reply Brief of Appellants September 13, 2002



APPENDIX J

Photograph of Roadside Ditch Next to Morris Leonard Road, Attached to Affidavit of Amanda L. Longfellow, Oct. 15, 2001

Supreme Court, U.S.
FILED
JAN 30 2004
OFFICE OF THE CLERK

No. 03-701

In the Supreme Court of the United States

JAMES S. AND REBECCA DEATON, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether wetlands that are adjacent to, and drain into, the headwaters of a nonnavigable intermittent stream, whose waters flow through a roadside ditch and several other channels and streams before reaching traditional navigable waters, are part of "the waters of the United States" within the meaning of the Clean Water Act, 33 U.S.C. 1362(7).

2. Whether application of the Clean Water Act to the wetlands at issue in this case is a permissible exercise of congressional authority under the Commerce Clause.

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In the Supreme Court of the United States

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JAMES S. AND REBECCA DEATON, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-26a) is reported at 332 F.3d 698. A prior opinion of the court of appeals in this case is reported at 209 F.3d 331. The opinion of the district court (Pet. App. 27a-49a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 12, 2003. A petition for rehearing was denied on August 11, 2003 (Pet. App. 52a). The petition for a writ of certiorari was filed on November 10, 2003 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The United States brought this civil enforcement action under the Federal Water Pollution Control Amendments of 1972 (Clean Water Act or CWA), 33 U.S.C. 1251-1387, alleging that petitioners had violated the CWA by discharging dredged or fill material into "waters of the United States" without a permit. The district court ruled in the government's favor, holding that petitioners' discharges were prohibited by the CWA. Pet. App. 27a-49a. The court of appeals affirmed. *Id.* at 1a-26a.

1. Section 301 of the Clean Water Act prohibits the "discharge of any pollutant by any person," unless in compliance with the Act. 33 U.S.C. 1311(a). "Discharge of a pollutant" is defined to include "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. 1362(12). The CWA defines the term "navigable waters" to mean "the waters of the United States, including the territorial seas." 33 U.S.C. 1362(7).

This Court has recognized that Congress, in enacting the CWA, "evidently intended to repudiate limits that had been placed on federal regulation by earlier water pollution control statutes and to exercise its powers under the Commerce Clause to regulate at least some waters that would not be deemed 'navigable' under the classical understanding of that term." *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133 (1985); see *International Paper Co.* v. *Ouellette*, 479 U.S. 481, 486 n.6 (1987) ("While the Act purports to regulate only 'navigable waters,' this term has been construed expansively to cover waters that are not navigable in the traditional sense.").[1] In *Riverside Bay-*

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[1] To avoid confusion between the term "navigable waters" as defined in the CWA and implementing regulations, see 33 U.S.C.

view, the Court upheld the assertion by the United States Army Corps of Engineers (Corps) of regulatory authority, under the CWA, over "all wetlands adjacent to other bodies of water over which the Corps has jurisdiction." 474 U.S. at 135.

In *Solid Waste Agency of Northern Cook County* v. *United States Army Corps of Engineers*, 531 U.S. 159 (2001) (*SWANCC*), this Court again construed the CWA term "waters of the United States." The Court in *SWANCC* held that use of "isolated" nonnavigable intrastate waters by migratory birds was not a sufficient basis for the exercise of federal regulatory jurisdiction under the CWA. The Court noted, and did not cast doubt upon, its prior holding in *Riverside Bayview* that the CWA's coverage extends beyond waters that are "navigable" in the traditional sense. See *id.* at 172. The Court stated, however, that "it is one thing to give a word limited effect and quite another to give it no effect whatever. The term 'navigable' has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made." *Ibid.*

2. The CWA sets up two complementary permitting schemes. Section 404(a) authorizes the Secretary of the Army, acting through the Corps, or a State with an approved program, to issue a permit "for the discharge of dredged or fill material into the navigable waters at specified disposal sites." 33 U.S.C. 1344(a). Under

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1362 and 33 C.F.R. 328.3, and the traditional use of the term "navigable waters" to describe waters that are, have been, or could be used for interstate or foreign commerce, see 33 C.F.R. 328.3(a)(1), this brief will refer to the latter as "traditional navigable waters."

Section 402, any discharge of pollutants other than dredged or fill material must be authorized by a permit issued by the United States Environmental Protection Agency (EPA) (or a State with an approved program) under the National Pollutant Discharge Elimination System (NPDES). See 33 U.S.C. 1342. The Corps and EPA share responsibility for implementing and enforcing Section 404 of the CWA. See, *e.g.*, 33 U.S.C. 1344(b) and (c).

The Corps and EPA have promulgated identical regulatory definitions of the term "waters of the United States." See 33 C.F.R. 328.3(a) (Corps definition); 40 C.F.R. 230.3(s) (EPA definition). The definition, as it relates to this case, encompasses, *inter alia*, traditional navigable waters, which include tidal waters and waters susceptible to use in interstate commerce, see 33 C.F.R. 328.3(a)(1), 40 C.F.R. 230.3(s)(1); "tributaries" to traditional navigable waters, see 33 C.F.R. 328.3(a)(5), 40 C.F.R. 230.3(s)(5); and wetlands that are "adjacent" to traditional navigable waters or their tributaries, see 33 C.F.R. 328.3(a)(7), 40 C.F.R. 230.3(s)(7).

3. a. In November 1988, petitioner James S. Deaton "signed a contract to buy a twelve-acre parcel of land in Wicomico County, Maryland, subject to the condition that it was suitable for developing a small residential subdivision." *United States* v. *Deaton*, 209 F.3d 331, 333 (4th Cir. 2000) (*Deaton I*). Approximately half of the parcel consisted of wetlands. C.A. App. 183. Because portions of the property were wet, however, the Wicomico County Health Department denied petitioner's application for a sewage disposal permit. *Deaton I*, 209 F.3d at 333. Petitioners nevertheless decided to proceed with the purchase of the land, intending to drain the parcel by digging a ditch across

the property, and they acquired title to the parcel in June 1989. *Ibid.*

Before any ditching work had begun, the United States Soil Conservation Service (SCS) "advised Mr. Deaton * * * that a large portion of the property contained nontidal wetlands and that he would need a permit from the Corps before undertaking any ditching work." Pet. App. 4a; see *Deaton I*, 209 F.3d at 333. Petitioners did not file a permit application, however, but instead "hired a contractor who dug a 1,100-foot ditch that crossed the areas of the property identified as wetlands by the SCS technician. The contractor piled the excavated dirt on either side of the ditch, a practice known as sidecasting." Pet. App. 4a; see *Deaton I*, 209 F.3d at 333.

In July 1990, the Corps learned of petitioners' unpermitted ditching activity, inspected the site, and determined that the wetlands on the parcel were part of "the waters of the United States" within the meaning of the Clean Water Act. Pet. App. 4a-5a; *Deaton I*, 209 F.3d at 333. The Corps issued stop-work orders, warning that the placement of fill material in the wetlands on petitioners' property violated the CWA. Pet. App. 5a; *Deaton I*, 209 F.3d at 333. In 1995, after lengthy negotiations with petitioners failed to resolve the dispute, the United States initiated a civil enforcement action, alleging that petitioners were in violation of Sections 301 and 404 of the Clean Water Act, 33 U.S.C. 1311, 1344, by discharging dredged or fill material into "the waters of the United States" without a permit. Pet. App. 5a; *Deaton I*, 209 F.3d at 333.

b. The government's complaint alleged that petitioners' wetlands were subject to the CWA because they were "adjacent to Headwaters of Purdue Creek, a tributary of [the] Wicomico River." C.A. App. 9. To

demonstrate that connection, the Corps deposited a small amount of non-toxic dye into the intermittent headwater stream that flows onto petitioners' land from a neighboring parcel. See Pet. App. 67a-68a; C.A. App. 127, 131, 155. The Corps traced the flow of water into petitioners' wetlands, through the ditch that petitioners had excavated, and into a culvert that receives water from the road ditch that borders petitioners' property alongside Morris Leonard Road.[2] From that point, the Corps observed the dye flowing through the culvert to a ditch on the other side of Morris Leonard Road and then through several segments of Perdue Creek that have been straightened, channelized, and incorporated into a network of agricultural drainage ditches managed by the local Public Drainage Association. See Pet. App. 68a; C.A. App. 127, 131. The Corps documented the flow of dye to Beaverdam Creek, which the parties stipulated to be a perennial stream that flows directly into the Wicomico River, a traditional navigable water that in turn feeds into the Chesapeake Bay. Pet. App. 73a-74a. All told, water from petitioners' parcel flows for approximately eight miles to the Wicomico River, which flows for roughly 25 more miles to the Chesapeake Bay. *Id.* at 4a.

4. a. On September 22, 1997, on cross-motions for summary judgment, the district court granted summary judgment for the government on the issue of liability, holding that petitioners' property contained "wetlands" within the meaning of the Corps' regulations, and that the wetlands were part of "the waters of the United States" within the meaning of the CWA.

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[2] The Corps added additional dye along the way, "as necessary to maintain a detectable level for visual observation and photography." Pet. App. 68a.

C.A. App. 36-60. On June 23, 1998, however, the district court reconsidered its judgment in light of intervening Fourth Circuit authority. The court granted summary judgment for petitioners on the ground that the sidecasting of excavated material into wetlands did not constitute a "discharge" of dredged or fill material. *Id.* at 61-68. The court of appeals reversed that decision and remanded for further proceedings in the district court. *Deaton I*, 209 F.3d at 337; see Pet. App. 5a.[3]

b. The case remained pending in the district court on remand when this Court issued its decision in *SWANCC*. Relying on that decision, petitioners asked the district court to reconsider its prior determination that the wetlands on petitioners' property were subject to federal regulatory authority under the CWA. See Pet. App. 5a. On January 28, 2002, after conducting a site visit and a hearing, the district court reaffirmed its earlier grant of summary judgment for the United States on the question of liability. See *id.* at 29a-47a. The court explained that petitioners' wetlands, unlike the isolated ponds at issue in *SWANCC*, had a surface water connection to traditional navigable waters. *Id.* at 40a-41a. The court also held that federal regulation of petitioners' filling activities under the CWA was a permissible exercise of congressional authority under the Commerce Clause. *Id.* at 44a-46a. Addressing the question of remedy, the district court ordered petitioners to restore the parcel but did not impose a financial penalty. *Id.* at 47a-49a.

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[3] Petitioners do not seek further review of the court of appeals' determination that their activities effected a "discharge" of dredged or fill material.

5. The court of appeals affirmed. Pet. App. 1a-26a.

a. The court of appeals observed that it was "undisputed that [petitioners'] wetlands are adjacent to" (Pet. App. 7a)—and "that surface water from [petitioners'] property drains into" (*id.* at 3a)—a "drainage ditch [that] runs alongside the road between the pavement and [petitioners'] property" (*ibid.*). The court further explained that, while the parties "disagree about how much water flows through the ditch, and how consistent the flow is, * * * they agree on the ditch's course" of flow to the Wicomico River eight miles away. *Ibid.* The court of appeals stated that its analysis would "focus on whether the Corps has jurisdiction over the roadside ditch," because "if the ditch is covered, so are the [adjacent] wetlands." *Id.* at 7a (citing *Riverside Bayview*).

b. The court of appeals held that the Corps' exercise of regulatory authority in this case "fits comfortably within Congress's authority to regulate navigable waters." Pet. App. 8a. The court explained that "[t]he power over navigable waters is an aspect of the authority to regulate the channels of interstate commerce"—the first of the three established categories of permissible Commerce Clause regulation identified by this Court in *United States* v. *Lopez*, 514 U.S. 549, 558-559 (1995). Pet. App. 10a. The court further observed that "[t]he power over navigable waters also carries with it the authority to regulate nonnavigable waters when that regulation is necessary to achieve Congressional goals in protecting navigable waters." *Id.* at 12a. The court explained that, because "[a]ny pollutant or fill material that degrades water quality in a tributary of navigable waters has the potential to move downstream and degrade the quality of the navigable waters themselves," the Corps' decision to "regulat[e] nonnavigable

tributaries and their adjacent wetlands * * * is well within Congress's traditional power over navigable waters." *Id.* at 13a. The court also rejected petitioners' contention that application of the CWA to their conduct was improper because their own activities were "too trivial to affect water quality in navigable waters." *Ibid.* The court explained that, under established Commerce Clause principles, Congress "may decide that the aggregate effect of all of the individual instances of discharge * * * justifies regulating each of them." *Ibid.*

c. The court of appeals held that the Corps had reasonably interpreted its "[t]ributaries" regulation (33 C.F.R. 328.3(a)(5)) to encompass the roadside ditch in this case. Pet. App. 16a-18a. The court observed that the plain meaning of the word "tributary" includes "a watercourse like the roadside ditch" that flows into another larger body of water. *Id.* at 18a. The court rejected petitioners' contention that "the term 'tributary' in the [Corps'] regulation refers only to a non-navigable branch that empties directly into a navigable waterway" rather than into another tributary. *Ibid.* The court explained that, "[a]lthough the Corps has not always chosen to regulate all tributaries, it has always used the word to mean the entire tributary system, that is, all of the streams whose water eventually flows into navigable waters." *Id.* at 19a. "Because the Corps's longstanding interpretation of the word 'tributary' has support in the dictionary and elsewhere," the court of appeals deferred to the Corps' determination that the roadside ditch in this case is a "tributary" within the meaning of the pertinent regulation. *Id.* at 19a-20a.

d. The court of appeals held that the Corps' "tributaries" regulation, construed to encompass the roadside ditch at issue here, reflected a permissible construction

of the CWA. Pet. App. 20a-22a. The court explained that this Court in *Riverside Bayview* had upheld the Corps' regulation of adjacent wetlands "in part because of what *SWANCC* described as 'the significant nexus between the wetlands and "navigable waters."'" *Id.* at 22a (quoting *SWANCC*, 531 U.S. at 167). The court of appeals stated that "[t]here is also a nexus between a navigable waterway and its nonnavigable tributaries" because "discharges into nonnavigable tributaries and adjacent wetlands have a substantial effect on water quality in navigable waters." *Ibid.* The court found that nexus "sufficient to allow the Corps to determine reasonably that its jurisdiction over the whole tributary system of any navigable waterway is warranted." *Ibid.*

ARGUMENT

The decision of the court of appeals is correct and does not squarely conflict with any decision of this Court or any other court of appeals. Further review is not warranted.

1. Petitioners contend (Pet. 10-12, 13-14) that the court of appeals' construction of the CWA as applying to the wetlands on their property is inconsistent with this Court's decisions in *Riverside Bayview* and *SWANCC*. Petitioners read those decisions as limiting federal regulatory authority under the CWA to waters having a "significant nexus" to traditional navigable waters, and they assert that such a nexus is absent here. Petitioners' claim lacks merit.

a. The Corps' delineation of its own regulatory authority under the CWA has long been premised on the fact that, because "[w]ater moves in hydrologic cycles," pollution of waters that do not themselves meet traditional tests of navigability "will affect the water quality of the other waters within that aquatic system."

Riverside Bayview, 474 U.S. at 134 (quoting 42 Fed. Reg. 37,128 (1977)); see Pet. App. 13a ("[T]he principle that Congress has the authority to regulate discharges into nonnavigable tributaries in order to protect navigable waters has long been applied to the Clean Water Act."); *id.* at 22a (accepting, as reasonable and supported by the evidence, the Corps' contention that "discharges into nonnavigable tributaries and adjacent wetlands have a substantial effect on water quality in [traditional] navigable waters"). Exclusion of nonnavigable tributaries and their adjacent wetlands from the coverage of the CWA would subvert Congress's efforts to ensure that the quality of traditional navigable waters is adequately protected. To prevent that result, the Corps and EPA have reasonably defined the term "waters of the United States" to include wetlands adjacent to tributaries that flow into traditional navigable waters.

b. This Court's decision in *SWANCC* does not cast doubt on the propriety of that regulatory determination. To the contrary, the Court in *SWANCC* quoted with apparent approval its prior holding that "Congress' concern for the protection of water quality and aquatic ecosystems indicated its intent to regulate wetlands 'inseparably bound up with the "waters" of the United States.'" 531 U.S. at 167 (quoting *Riverside Bayview*, 474 U.S. at 134). And while the Court in *SWANCC* rejected the Corps' construction of the term "waters of the United States" as encompassing isolated ponds based on their use as habitat for migratory birds, *id.* at 171-172, its reasoning does not cast doubt on the propriety of the Corps' assertion of regulatory authority here.

The Court in *SWANCC* explained that, if the use of isolated ponds by migratory birds were found to be a

sufficient basis for federal regulatory jurisdiction under the CWA, the word "navigable" in the statute would be rendered superfluous. 531 U.S. at 172. While recognizing that the term "navigable waters" as used in the CWA includes "at least some waters that would not be deemed 'navigable' under the classical understanding of that term," *id.* at 171 (quoting *Riverside Bayview*, 474 U.S. at 133), the Court stressed that the word "navigable" must be given some substantive content, see *id.* at 172 ("[I]t is one thing to give a word limited effect and quite another to give it no effect whatever."). The Court concluded that "[t]he term 'navigable' has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made." *Ibid.*

Unlike the Corps' prior effort to regulate "isolated" waters used as habitat by migratory birds, the regulation of petitioners' filling activities rests squarely on the agency's longstanding authority to protect traditional navigable waters. "Any pollutant or fill material that degrades water quality in a tributary of navigable waters has the potential to move downstream and degrade the quality of the navigable waters themselves." Pet. App. 13a. Construing the CWA term "waters of the United States" to encompass wetlands adjacent to tributaries that flow into traditional navigable waters thus gives independent content to the term "navigable," and accords with the established understanding of congressional power to regulate and protect traditional navigable waters. See *id.* at 12a-13a, 17a-18a; *Oklahoma ex rel. Phillips* v. *Guy F. Atkinson Co.*, 313 U.S. 508, 525-526 (1941) (Congress may authorize flood control projects on intrastate nonnavigable tributaries

in order to prevent flooding in traditional navigable rivers); see also *United States* v. *Rapanos*, 339 F.3d 447, 450-453 (6th Cir. 2003) (upholding CWA jurisdiction over wetlands that flow through a man-made ditch and nonnavigable natural tributary to reach traditional navigable waters 11 to 20 miles downstream), petition for cert. pending, No. 03-929 (filed Dec. 22, 2003); *Headwaters, Inc.* v. *Talent Irrigation Dist.*, 243 F.3d 526, 533-534 (9th Cir. 2001) (upholding CWA jurisdiction over nonnavigable irrigation canals that receive water from, and divert water to, natural streams and lakes). The demonstrated risk that pollutant discharges into tributaries and their adjacent wetlands will ultimately impair the quality of traditional navigable waters, and the proven surface water connection between the wetlands on petitioners' property and the Wicomico River (and ultimately the Chesapeake Bay), together establish a "significant nexus" between petitioners' wetlands and traditional navigable waters.

c. Concededly, not every discharge of fill material into "the waters of the United States" (as the Corps and EPA have defined the term) can be expected to have deleterious effects on the quality of traditional navigable waters. That fact, however, does not cast doubt on the propriety of the agencies' adjacent wetlands regulations. As the Court in *Riverside Bayview* explained:

> [I]t may well be that not every adjacent wetland is of great importance to the environment of adjoining bodies of water. But the existence of such cases does not seriously undermine the Corps' decision to define all adjacent wetlands as "waters." * * * That the definition may include some wetlands that are not significantly intertwined with the ecosystem

> of adjacent waterways is of little moment, for where it appears that a wetland covered by the Corps' definition is in fact lacking in importance to the aquatic environment—or where its importance is outweighed by other values—the Corps may always allow development of the wetland for other uses simply by issuing a permit.

474 U.S. at 135 n.9. Thus, inclusion of petitioners' wetlands within the regulatory definition of "waters of the United States" does not mean that filling of such wetlands is necessarily prohibited. It simply means that the Corps will analyze (and attempt to mitigate) the likely impacts of proposed discharges on federal interests before deciding whether a particular project may go forward. By discharging pollutants into those wetlands without seeking a Section 404 permit, petitioners prevented the Corps from making that determination.

d. Petitioners contend (Pet. 13-14) that, even if the roadside ditch at issue in this case is part of the "waters of the United States" within the meaning of the CWA, the Corps lacked regulatory authority over the wetlands adjacent to that ditch. Petitioners rely on this Court's statement in *SWANCC* that the Corps' authority under the CWA does not "extend[] to ponds that are *not* adjacent to open water." *SWANCC*, 531 U.S. at 168. Petitioners construe the term "open water," as it appears in the *SWANCC* opinion, to refer solely to traditional navigable waters, and they observe that the wetlands on petitioners' property are not adjacent to "open water" so defined. See Pet. 14.

Petitioners' effort to equate the term "open water" with traditional navigable waters is unfounded. When the Court in *SWANCC* referred to ponds "that are *not*

adjacent to open water," 531 U.S. at 168, it was alluding to a footnote in *Riverside Bayview* in which the Court had reserved the "question of the authority of the Corps to regulate discharges of fill material into wetlands that are not adjacent to bodies of open water, see 33 C.F.R. §§ 323.2(a)(2) and (3) (1985)." *Riverside Bayview*, 474 U.S. at 131-132 n.8 (quoted in *SWANCC*, 531 U.S. at 167-168). When that footnote is read in context, it is clear that the Court in *Riverside Bayview* was reserving the question of jurisdiction over wetlands that are isolated from, rather than adjacent to, any other covered waters, without regard to navigability.[4]

Elsewhere in the *Riverside Bayview* opinion, moreover, the Court used the phrase "open water" as a shorthand for "rivers, streams, and other hydrographic features more conventionally identifiable as 'waters,'" in order to distinguish those types of water bodies from wetland areas, such as "shallows, marshes, mudflats, swamps, [and] bogs." *Riverside Bayview*, 474 U.S. at 131-132. The Court did not use the phrase "open water" to distinguish navigable from nonnavigable streams. See, *e.g.*, *id.* at 134 (using the phrase "adjacent bodies of open water" interchangeably with "adjacent lakes, rivers, and streams," without reference to

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[4] The pertinent footnote in *Riverside Bayview* cited 33 C.F.R. 323.2(a)(2) and (3) (1985), which have since been re-codified at 33 C.F.R. 328.3(a)(2) and (3). Those are the subsections of the regulatory definition of "waters of the United States" that cover interstate and isolated intrastate wetlands, respectively. If, by referring to "wetlands that are not adjacent to bodies of open water," the Court had meant to include wetlands adjacent to nonnavigable tributaries, it would presumably have cited as well 33 C.F.R. 323.2(a)(5) and (7) (1985), which encompass nonnavigable tribuaries and wetlands adjacent to those tributaries.

navigability). Finally, under petitioners' interpretation of the term "open water," the CWA would not encompass wetlands adjacent to nonnavigable tributaries, even if those tributaries are themselves "waters of the United States." That view cannot be reconciled with *Riverside Bayview*'s square holding that "a definition of 'waters of the United States' encompassing all wetlands adjacent to other bodies of water over which the Corps has jurisdiction is a permissible interpretation of the Act." *Riverside Bayview*, 474 U.S. at 135.

2. Contrary to petitioners' contention (Pet. 12-13), the Fourth Circuit's decision in this case does not squarely conflict with any decision of another court of appeals.

a. Petitioners' reliance (Pet. 12-13) on *Rice* v. *Harken Exploration Co.*, 250 F.3d 264 (5th Cir. 2001), is misplaced. *Rice* addressed the question whether the Oil Pollution Act of 1990 (OPA), 33 U.S.C. 2701 *et seq.*, imposed liability on parties who discharged oil onto dry ground, where that oil was alleged to have migrated into various types of waters. Like the Clean Water Act, the OPA regulates discharges into "navigable waters," defined as "the waters of the United States." 33 U.S.C. 2701(21); see 33 U.S.C. 2702(a). The term is generally understood to have the same meaning under both statutes. See *Rice*, 250 F.3d at 267-268.

The court in *Rice* rejected each of three suggested bases for the imposition of OPA liability. First, the Fifth Circuit addressed the question whether the OPA regulated "discharges of oil that contaminate the groundwater," and it held that "subsurface waters are not 'waters of the United States' under the OPA." 250 F.3d at 270. Second, the court in *Rice* addressed the plaintiffs' contention that "surface waters on the [property] are directly threatened by [the defendant's]

discharges into the groundwater." *Ibid.* The court found that all discharges were onto dry land and that there was no evidence of any discharge directly into surface water. *Ibid.* The court further concluded that, even if the discharges could be shown to have seeped into the surface waters on the ranch, the record was insufficient to support a determination that those waters were part of "the waters of the United States." The court explained that the record in the case contained "no detailed information about how often the creek runs, about how much water flows through it when it runs, *or about whether the creek ever flows directly (above ground) into the Canadian River.*" *Id.* at 270-271 (emphasis added). Absent proof of a surface connection between the creek in question and any traditional navigable water, the court was unable to conclude that the creek was "sufficiently linked to an open body of navigable water as to qualify for protection under the OPA." *Id.* at 271. Third, the court in *Rice* addressed the question whether "discharges into groundwater that migrate into protected surface waters" are covered by the OPA. *Ibid.* The court held that the OPA does not apply to "discharges onto land, with seepage into groundwater, that have only an indirect, remote, and attenuated connection with an identifiable body of 'navigable waters.'" *Id.* at 272.

Thus, the Fifth Circuit's decision in *Rice* was premised on the absence of any demonstrated surface water connection between the allegedly contaminated seasonal creek and any traditional navigable water. The decision therefore does not conflict with the Fourth Circuit's ruling in the instant case, which upheld the exercise of federal regulatory authority under the CWA based on the presence of such a connection.

b. For similar reasons, the Fifth Circuit's recent decision in *In re Needham*, No. 02-30217, 2003 WL 22953383 (Dec. 16, 2003), issued after the filing of the certiorari petition in the instant case, does not squarely conflict with the Fourth Circuit's decision here. *Needham*, like *Rice*, involved a suit under the OPA. See *id.* at *1. The oil at issue in *Needham* "was originally discharged into [a] drainage ditch at Thibodeaux Weil," and from there "spilled into Bayou Cutoff, and then into Bayou Folse. Bayou Folse flows directly into the Company Canal, an industrial waterway that eventually flows into the Gulf of Mexico." *Ibid.* The Fifth Circuit held that the defendants' conduct was covered by the OPA. *Id.* at *4-*5. The court stated that "the proper inquiry is whether Bayou Folse, the site of the farthest traverse of the spill, is navigable-in-fact or adjacent to an open body of navigable water." *Id.* at *4. The Fifth Circuit found that "Bayou Folse is adjacent to an open body of navigable water, namely the Company Canal," *ibid.*; and it concluded on that basis that "the Thibodeaux Well oil spill implicated navigable waters and triggered federal regulatory jurisdiction pursuant to the OPA," *id.* at *5.

In the course of its analysis, the Fifth Circuit appeared to disapprove the results reached by the Fourth and Sixth Circuits in the instant case and *Rapanos*, and it stated that "[t]he CWA and the OPA are not so broad as to permit the federal government to impose regulations over 'tributaries' that are neither themselves navigable nor truly adjacent to navigable waters." *Needham*, 2003 WL 22953383, at *3. That statement was dictum, however, in light of the *Needham* court's determination that the oil spill actually involved in that case was covered by the OPA. And while the *Needham*

court stated that "both the regulatory and plain meaning of 'adjacent' mandate a significant measure of proximity," *id.* at *5 n.12, and that "the term 'adjacent' cannot include every possible source of water that eventually flows into a navigable-in-fact waterway," *id.* at *5, the court did not offer a precise rule for determining when a nonnavigable tributary is "adjacent" to a traditional navigable water. Thus, even assuming that the Fifth Circuit decides to follow the *Needham* dictum in a future case where the issue is actually presented, it is unclear to what extent the approaches taken by the Fourth and Fifth Circuits would lead to different results in concrete factual settings.

It should also be noted that the Fifth Circuit in *Needham* sustained the application of the OPA to the defendants' conduct based on the ultimate downstream presence of oil in Bayou Folse. See 2003 WL 22953383, at *4-*5; p. 18, *supra.* The court did not examine whether the drainage ditch (the site of the original discharge) or Bayou Cutoff (the body of water into which the ditch directly flowed) was itself "adjacent" (as the court understood that term) to any traditional navigable water. Rather, the court framed the relevant question as "whether Bayou Folse, the site of the farthest traverse of the spill," satisfied the court's adjacency requirement. *Needham*, 2003 WL 22953383, at *4.

Thus, where it can be shown that an oil discharge has actual downstream effects, the Fifth Circuit (correctly) regards the OPA as applicable even if the first water body into which oil is discharged does not meet the court's standard for being "actually navigable or * * * adjacent to an open body of navigable water." *Rice*, 250 F.3d at 269. The Fifth Circuit may also decide, in an appropriate future case, that an upstream discharge is

covered by the OPA where the downstream effects of an oil discharge are potential rather than actual (*e.g.*, where remedial measures prevent discharged oil from reaching waters that the Fifth Circuit regards as "adjacent" to traditional navigable waters). The Fifth Circuit's willingness to consider the downstream effects of an oil discharge in determining the applicability of the OPA further diminishes the current practical significance of that court's dictum expressing apparent disagreement with the regulatory approach adopted by the government and sustained by the Fourth Circuit in this case.

3. Petitioners' other statutory arguments (Pet. 23-28) lack merit as well.

a. Contrary to petitioners' contentions, the court of appeals did not err in upholding the Corps' exercise of regulatory authority even in the absence of unambiguous language in the CWA encompassing the waters at issue here (see Pet. 23-25), and the court correctly deferred to the expert agencies' construction of the CWA term "waters of the United States" as encompassing wetlands adjacent to tributaries of traditional navigable waters (see Pet. 25-26). *Riverside Bayview* squarely held that the Corps and EPA may assert regulatory authority over at least *some* wetlands and other waters that do not themselves meet traditional standards of navigability, based on their hydrological connections to traditional navigable waters. *SWANCC* did not cast doubt on that proposition. Because Congress did not specify *which* wetlands and tributaries have a sufficient nexus to traditional navigable waters to justify federal constraints on pollutant discharges, the expert agencies to which Congress entrusted the Act's administration must necessarily exercise a measure of discretion in determining the scope of the

CWA's coverage. The regulatory definition of "waters of the United States" promulgated by the Corps and the EPA is therefore entitled to judicial deference. See Pet. App. 17a-18a ("The statutory term 'waters of the United States' is sufficiently ambiguous to constitute an implied delegation of authority to the Corps; this authority permits the Corps to determine which waters are to be covered within the range suggested by *SWANCC*."); cf. *Riverside Bayview*, 474 U.S. at 134 ("In view of the breadth of federal regulatory authority contemplated by the Act itself and the inherent difficulties of defining precise bounds to regulable waters, the Corps' ecological judgment about the relationship between waters and their adjacent wetlands provides an adequate basis for a legal judgment that adjacent wetlands may be defined as waters under the Act.").

b. There is also no merit to petitioners' contention (Pet. 27-28) that the Corps' assertion of regulatory authority here is inconsistent with the agency's historical practice. Petitioners state (Pet. 27) that "[f]rom the CWA's passage until the 1990s, the Corps explicitly stated that drainage and irrigation ditches are *not* 'waters of the United States.'" That is incorrect. The Corps stated in the preamble to a 1986 regulation that it "generally do[es] not consider * * * [n]on-tidal drainage and irrigation ditches *excavated on dry land*" to be part of "the waters of the United States" within the meaning of the CWA. 51 Fed. Reg. 41,217 (1986) (emphasis added). Even with respect to that category of ditches, however, the Corps expressly "reserve[d] the right on a case-by-case basis to determine that a particular waterbody * * * is a water of the United States." *Ibid.* In any event, the ditches involved in this case, which were excavated in part through wetlands and which re-diverted a pre-existing intermittent

stream (see Pet. App. 71a-73a, 75a; C.A. App. 127, 131), were not "excavated on dry land" within the meaning of the 1986 preamble. There is consequently no basis for petitioners' claim that the Corps has historically disclaimed regulatory authority over ditches of the sort at issue here. See also 65 Fed. Reg. 12,823-12,824 (2000) (providing further clarification of when the Corps will treat water in drainage ditches as part of "the waters of the United States" for purposes of the CWA).

4. Petitioners contend (Pet. 14) that the court of appeals' Commerce Clause analysis "is inconsistent with this Court's precedents and conflicts with other circuits." Every court of appeals that has addressed the question, however, has held that the CWA may constitutionally be applied to nonnavigable tributaries and their adjacent wetlands.[5] Petitioners' constitutional challenge lacks merit and does not warrant this Court's review.

a. Petitioners appear to concede (see Pet. 15) that the Commerce Clause vests Congress with authority to regulate activities in upstream nonnavigable waters in order to prevent harm to traditional navigable waters

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[5] See, *e.g.*, *United States* v. *Pozsgai*, 999 F.2d-719, 733-734 (3d Cir. 1993), cert. denied, 510 U.S. 1110 (1994); *United States* v. *Tull*, 769 F.2d 182, 185 (4th Cir. 1985), rev'd on other grounds, 481 U.S. 412 (1987); *United States* v. *Hartsell*, 127 F.3d 343, 348 (4th Cir. 1997), cert. denied, 523 U.S. 1030 (1998); *United States* v. *Ashland Oil & Transp. Co.*, 504 F.2d 1317, 1325-1329 (6th Cir. 1974); *United States* v. *Byrd*, 609 F.2d 1204, 1210 (7th Cir. 1979). See also *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 282 n.21 (1981) (citing favorably to *Ashland Oil* and *Byrd* and agreeing that "the power conferred by the Commerce Clause [is] broad enough to permit congressional regulation of [intrastate] activities causing air or water pollution, or other environmental hazards that may have effects in more than one state").

downstream. Petitioners contend, however, that Congress may exercise that authority "only upon findings or evidence demonstrating that the activity at issue will actually impact navigable waters." *Ibid.* Petitioners' demand for case-specific proof of harm to traditional navigable waters is misconceived. The courts have long recognized that pollution and environmental degradation in the nonnavigable portion of a tributary system can be expected, as a general matter, to have an adverse effect on water quality in the traditional navigable waters to which those tributaries lead.[6] That valid generalization, combined with case-specific proof (through the dye test and other evidence) of a surface water connection between petitioners' wetlands and traditional navigable waters, provides a constitutionally sufficient basis for federal regulation of petitioners' discharges.[7]

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[6] As the Sixth Circuit has explained:

> It would, of course, make a mockery of [Congress's Commerce Clause] powers if its authority to control pollution was limited to the bed of the navigable stream itself. The tributaries which join to form the river could then be used as open sewers as far as federal regulation was concerned. The navigable part of the river could become a mere conduit for upstream waste.
>
> Such a situation would have vast impact on interstate commerce.

United States v. *Ashland Oil & Transp. Co.*, 504 F.2d 1317, 1326 (6th Cir. 1974).

[7] Petitioners argue (Pet. 16) that the court of appeals' analysis was flawed because "[n]othing in the record suggests that dirt left [petitioners'] property, flowed through the roadside ditch, or reached, much less degraded, downstream navigable waters." Petitioners' construction work was halted, however, soon after it began. Congress is not required to wait until harm to traditional navigable waters actually materializes; Congress can act to pre-

b. Petitioners' demand for case-specific proof of harm, as a constitutional prerequisite to the Corps' assertion of regulatory authority under the CWA, is also in considerable tension with this Court's analysis in *Riverside Bayview*. The Court in *Riverside Bayview* noted the possibility that the term "waters of the United States," as defined in the Corps' regulations, "may include some wetlands that are not significantly intertwined with the ecosystem of adjacent waterways." 474 U.S. at 135 n.9. The Court found that prospect to be "of little moment," however, because the Corps in such circumstances may allow development to go forward simply by issuing a permit. *Ibid.*; see pp. 13-14, *supra*.

Although the Court in *Riverside Bayview* was not confronted with a Commerce Clause challenge to the Corps' regulation, that aspect of its analysis sheds considerable light on the constitutional question presented here. Congress's authority to prevent pollutant discharges that will actually degrade the quality of traditional navigable waters necessarily includes the power to devise reasonable procedures for determining, *before* a particular discharge occurs, whether the

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vent that harm by prohibiting or controlling particular activities in nonnavigable waters upstream. See, *e.g.*, *Oklahoma ex rel. Phillips* v. *Guy F. Atkinson Co.*, 313 U.S. 508 (1941) (Congress has power to control activities in nonnavigable tributaries in order to prevent flooding downstream). The harm caused by discharges of dredged or fill material into wetlands, moreover, is not limited to the potential for sediment to be released downstream. An even greater potential for harm arises from the *filling* of wetlands, which reduces or destroys their capacity to perform a variety of essential hydrological and ecological functions, such as filtering and absorbing pollutants from runoff and storing flood waters. See *Riverside Bayview*, 474 U.S. at 134-135; *Deaton I*, 209 F.3d at 336.

discharge is likely to have that effect. The Section 404 permitting process serves in part to assist the Corps in making that determination. The regulatory regime would be severely undermined if the Corps were required to prove a likelihood of harm to traditional navigable waters in each case before the Section 404 requirements could be triggered.

c. As the court of appeals recognized, Congress may regulate a broad class of pollutant discharges, notwithstanding the "trivial" impact on traditional navigable waters of a single individual's conduct, if "the aggregate effect of all of the individual instances of discharge, like the discharge by [petitioners], justifies regulating each of them." Pet. App. 13a. Petitioners contend (Pet. 19) that the court of appeals erred by applying that aggregation principle to a *Lopez* "sphere 1" analysis, which governs federal regulation of the "channels of commerce." Petitioners argue (Pet. 20) that the aggregation principle can be employed only in a *Lopez* "sphere 3" analysis, which asks whether the regulated activities, when viewed in the aggregate, have a "substantial effect[]" on interstate commerce.

The cases cited by petitioners (Pet. 20 & n.9), however, do not support their claim. Those cases state that, where Congress seeks to regulate the channels of commerce, it is not *necessary* to demonstrate that the class of regulated activities substantially affects interstate commerce. Those decisions do not hold that Congress is foreclosed from relying on aggregate effects when deciding whether and how to protect the channels of commerce (*e.g.*, traditional navigable waters) from potentially harmful upstream activities.

d. Petitioners contend (Pet. 21) that the exercise of federal regulatory authority in this case cannot withstand scrutiny under the Commerce Clause because it

obliterates the distinction between what is national and what is local. Their argument, however, relies on the mistaken premise that, by asserting CWA jurisdiction over tributary streams that have been straightened, channelized, and incorporated into the local Public Drainage Association (PDA), the Corps has effectively "federaliz[ed]" that local drainage system. Pet. 22. In fact, the only activity in a PDA ditch or stream that requires a CWA permit is the discharge of a pollutant from a point source into that ditch or stream. Other functions and activities relating to agricultural drainage issues remain in the hands of the local authorities.

In *SWANCC*, this Court found that application of the CWA to intrastate, nonnavigable, isolated waters, based on the presence of migratory birds, would raise serious constitutional questions in part because such regulation would intrude on traditional state and local control over land and water use. See 531 U.S. at 172-173. The isolated waters at issue in *SWANCC*, however, had no hydrological connection, and the asserted basis for CWA jurisdiction bore no relation, to traditional navigable waters. By contrast, the ditch and wetlands at issue here have an undisputed surface water connection to the Wicomico River, and ultimately to the Chesapeake Bay. Because the Corps' exercise of regulatory authority over petitioners' discharges serves the quintessential federal goal of protecting and enhancing water quality in traditional navigable waters, this case implicates core federal interests that were not present in *SWANCC*. See pp. 11-13, *supra*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 03-701

In The

Supreme Court of the United States

JAMES S. and REBECCA DEATON,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to
The United States Court of Appeals for the Fourth Circuit

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QUESTIONS PRESENTED

Because the government's brief recharacterizes petitioners' questions presented, they bear repeating in this Reply.

A three-foot wide roadside drainage ditch runs alongside the property of James and Rebecca Deaton in rural Wicomico County, Maryland. The roadside ditch was built and is maintained by the county roads department and connects to a ditch system operated by a public association established under state law to address local drainage problems. The Deatons dug a ditch on their property and, in so doing, disturbed an area the United States Army Corps of Engineers considers a wetland. There is no showing that common dirt—the pollutant at issue—left the Deatons' property, flowed into the roadside ditch, or reached any truly navigable waters.

The questions presented are:

1. Are the roadside ditch and the wetland next to it "navigable waters" under the Clean Water Act?
2. Where activity in a wetland has not degraded either a nonnavigable roadside ditch next to the wetland or a downstream traditional navigable water, does Congress's commerce power over navigation allow federal regulation of that wetland or that roadside ditch?

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This case raises issues of national importance. Eleven separate amici curiae briefs have been filed on behalf of 36 entities and millions of citizens urging the Court to hear this case. Two other cases on petition for this Court's review adopted the holding and reasoning of the decision below. *Treacy v. Newdunn Assocs. LLP,* 334 F.3d 416, *petition for cert. filed*, 72 U.S.L.W. 3310 (U.S. Oct. 27, 2003) (No. 03-637); *United States v. Rapanos,* 339 F.3d 447 (6th Cir. 2003), *petition for cert. filed*, 72 U.S.L.W. 3451 (U.S. Dec. 22, 2003) (No. 03-929).

The split in the circuits is sharp. The Fifth Circuit has explicitly and unequivocally rejected the Fourth Circuit's legal theory, holding that it is "unsustainable under [this Court's decision] in *SWANCC*." *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs,* 531 U.S. 159 (2001) ("*SWANCC*").

The core legal question is whether the Fourth Circuit erred in holding a roadside ditch and wetlands next to it to be "navigable waters" under the Clean Water Act, 33 U.S.C. § 1251 *et seq.* ("CWA"), simply because those areas have "some" connection to navigable waters. A physical course across the landscape, through which water may "eventually flow," was the only evidence the court of appeals found necessary to so hold.

I. The Conflict in the Circuits

The government argues that the decision below does not "squarely conflict" with *Rice v. Harken*, 250 F.3d 264 (5th Cir. 2001), already discussed, Pet. 12-13, or *In re Needham*, 354 F.3d 340 (5th Cir. 2003), decided six weeks ago. Opp. 16. Calling two mountains one valley does not hide the mountains. The split is profound.

In *Needham*, the Fifth Circuit explicitly considered and rejected the government's argument that statutory "navigable waters" means "all waters . . . that have any hydrological connection with 'navigable water.'" *Needham,* 354 F.3d at 345. The Fifth Circuit recognized that the Fourth Circuit had "agreed with this expansive interpretation," thereby "asserting authority under the CWA

over wetlands that are 'adjacent to, and drain into, a roadside ditch whose waters eventually flow into the navigable Wicomico River and Chesapeake Bay....'" *Id.* at 345 (citing *United States v. Deaton*, 332 F.3d 698, 702 (4th Cir. 2003)). It also recognized that the Sixth Circuit had followed *Deaton* in *United States v. Rapanos*, 339 F.3d 447 (6th Cir. 2003). But, after considering the jurisdictional assertions upheld in those cases, it declared them "unsustainable under *SWANCC*."

> The CWA and the [Oil Pollution Act] are not so broad as to permit the federal government to impose regulations over "tributaries" that are neither themselves navigable nor truly adjacent to navigable waters. *See Rice,* 250 F.3d at 269. Consequently, *in this circuit* the United States may not simply impose regulations over puddles, sewers, *roadside ditches* and the like; under *SWANCC,* "a body of water is subject to regulation...if the body of water is actually navigable or adjacent to an open body of navigable water." *Rice,* 250 F.3d at 269.

Needham, 354 F.3d at 345 (emphasis added).[1] The Fifth Circuit explicitly and plainly split with the Fourth Circuit on the definition of "navigable waters." The government's spin to the contrary is simply wishful thinking.

The Fourth and Fifth Circuits are also in conflict on whether deference is due the government's litigation position. In *Deaton*, the Fourth Circuit deferred to the "eventually flows" theory, reasoning that the government's position "does not invoke the outer limits of Congress's power or alter the federal-state framework." Pet. 14a. In *Needham*, however, the Fifth Circuit refused to defer because the position advanced by the government pushes

> to the outer limits of the Commerce Clause and raise[s] serious constitutional questions. . . . *Rice*

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[1] The court held likewise that "the term 'adjacent' cannot include every possible source of water that eventually flows into a navigable-in-fact waterway." *Id.* at 347.

> and *SWANCC* have rejected such an expansive reading of the OPA and CWA respectively. Accordingly, the regulation is not entitled to *Chevron* deference.

Needham, 354 F.3d at 346, n.8. Certiorari is warranted not only to resolve the split on the meaning of "navigable waters," but also to give guidance to the lower courts on the deference to be afforded the government.

The practical consequences of the split are enormous. Corps headquarters has forbidden its field offices from developing their own written guidance on which waters are "navigable waters."[2] The only applicable national guidance for field staff, who make 68,000 "navigable water" determinations each year,[3] is a Joint Memorandum issued in January 2003. That memorandum instructs field staff to work "case by case" and consider "relevant court decisions." Advance Notice of Proposed Rulemaking on the Clean Water Act Regulatory Definition of "Waters of the United States," 68 Fed. Reg. 1991, 1998 (2003). Thus, if the Deatons' wetlands and the roadside ditch were in the Fifth Circuit, and the local Corps office followed Fifth Circuit law, they would not be federalized. But how will a staff biologist determine what decisions are relevant? Corps and EPA field offices overlap the judicial circuits. What law should be applied by the EPA regional office in Atlanta, which covers states in the Fourth, Fifth, and Eleventh Circuits? Aside from the confusion confronting Corps and EPA staff, as the amici curiae briefs filed on behalf of 36 entities and millions of citizens amply demonstrate, there is also a strong public interest in resolving these conflicts.

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[2] *See* Memorandum from Charles Hess, Chief, Operations Division, Civil Works, U.S. Army Corps of Engineers, to All Commanders, Major Subordinate Commands and District Commands (May 11, 2001), *available at* http://www.eswr.com/corpsmem51101.pdf.

[3] U.S. Army Corps of Engineers, *Regulatory Statistics - FY2002*, p. 2, available at http://www.usace.army.mil/inet/functions/cw/cecwo/reg/2002webcharts.pdf.

II. Statutory Issues

A. Policy. The government argues that it must call the roadside ditch a "navigable water" because (1) water moves in hydrologic cycles, (2) therefore, as a general matter, pollution in nonnavigable waters can affect the quality of navigable waters, and, therefore, (3) to not deem the ditch a navigable water "would subvert Congress's efforts to ensure that the quality of traditional navigable waters[4] is adequately protected." Opp. at 10-11. This logic tree is unsupported and off point.

First, it is not necessary to call the ditch a statutory "navigable water" to achieve the CWA's pollution prevention goals. The Act regulates discharges from point sources to navigable waters (such as the Wicomico River), and ditches fall with the Act's definition of point sources. 33 U.S.C. §§ 1342, 1362(14). Thus, an activity on a remote, nonnavigable tributary (perhaps a ditch) that results in the discharge of a pollutant to a truly "navigable water" can be regulated without federalizing the nonnavigable tributary (the ditch). *See, e.g.*, Hon. J. Duncan Amicus Br. at 9-10. The federal government can regulate the activity without federalizing the place.

Second, the government's policy argument, combined with the Fourth Circuit's "eventually flows" holding, would establish a categorical rule making virtually all surface water "navigable waters" if some connection to navigable waters, however tenuous, could be drawn. Municipal storm sewers "eventually flow" to navigable waters. If they were

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[4] The government says that "traditional navigable waters" are waters "that are, have been or could be used for interstate or foreign commerce." Opp. at 2-3 n.1. This definition would subvert *SWANCC sub rosa* by expanding traditional navigable waters to include all waters without regard to their capability of use to transport interstate and foreign commerce. This is contrary to *SWANCC*, 531 U.S. at 169, 172, the Corps' own regulations, 33 C.F.R. § 329.4 (navigable waters are waters that are "presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce"), and the agencies post-*SWANCC* pronouncements. 68 Fed. Reg. 1991, 1996 (2003).

treated as "navigable waters," permits would be required for any discharges into those sewers, regardless whether pollutants would ever reach traditional navigable waters. By the same token, the water in the sewer itself would be required to meet water quality standards. Duncan Br. at 7-8 n.7. Building Industry Legal Defense Foundation *et al.* (BILD) Amicus Br. at 7-8. Farm furrows, curbs and gutters likewise "eventually flow" to navigable waters and would also become navigable waters. Brief of California Farm Bureau at 6-7; BILD Br. at 7-8 (citing San Diego CWA permit claiming CWA jurisdiction over streets, curbs and gutters).

B. Significant Nexus. The government disagrees that *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985), and *SWANCC* limit statutory "navigable waters" to "waters having a 'significant' nexus' to traditional navigable waters." Opp. 10. Nonetheless, it insists it has proven a "significant nexus" between the wetlands on the Deatons' property and the Wicomico River based on (1) "the demonstrated risk" that pollutants in tributaries will "ultimately impair" traditional navigable waters, "together with" (2) "the proven surface water connection between the wetlands on petitioners' property and the Wicomico River..." Opp. 13.

First, it is unclear from the government's brief what, exactly, "demonstrates" the asserted "risk" to traditional navigable waters. There is no specific evidence in the record of this case demonstrating such a risk. Nor does the government cite a rulemaking or other administrative record that would establish such a risk. The only thing the government offers is that, because "[w]ater moves in hydrologic cycles," pollution in nonnavigable waters "will affect the water quality of other waters. . ." Opp. 10. If generic reference to the hydrologic cycle is sufficient to "demonstrate" a risk to navigable waters from nonnavigable sources, then that risk will exist in all cases.

Second, the government claims that the dye test demonstrates a connection between the Deatons' wetlands and the Wicomico River (Opp. 5-6). But the existence of

"a" connection does not satisfy *SWANCC*'s command for a "significant nexus." *SWANCC*, *Rice* and *Needham* demand a showing that the nonnavigable waters be "inseparably bound up" with navigable waters and that the government establish in this enforcement case a "close, direct and proximate link" between the Deatons' ditch-digging activities and "any resulting contamination of a particular body of natural surface water." *SWANCC* at 163; *Rice* at 272.[5]

C. Open Water. The government acknowledges that its authority does not "[e]xtend to ponds that are *not* adjacent to open water," Opp. 14 (citing *SWANCC,* 531 U.S. at 168 (emphasis in original)), but its brief suggests that the shallow ditch at issue in this case is "open water." This Court first used the term "open water" in a CWA case in *Riverside*, where the Court upheld CWA jurisdiction over wetlands "actually abutting" Black Creek, a navigable-in-fact waterway. In so holding, the Court stressed that it was expressing no opinion on the status of "wetlands that are not adjacent to bodies of open water," *Riverside*, 474 U.S. 121, 131 n.8. When the Court referred to "open water," it was in the context of Black Creek, *i.e.*, actually

[5] The government also distorts the facts by claiming "the ditches involved in this case . . . re-diverted a pre-existing intermittent stream [and are therefore statutory "navigable waters"] because they were not 'excavated on dry land.'" Opp. 20-21. With regard to the roadside ditch (the "focus" of this case), nothing in the record says that that ditch "re-diverted a pre-existing intermittent stream" or was not "excavated on dry land," and the government has never made that argument in the 14 years since this case began. As to the ditch the Deatons dug through their property, the parties disputed whether there was an intermittent stream on the property, but ultimately the district court determined that the presence of the alleged stream "is not material to the resolution" of the jurisdictional issue, *United States v. Deaton*, No. MTG-95-240, slip op. at 14 n.12 (D. Md. Sept. 22, 1997)(C.A. App. at 49) and went on to find jurisdiction on other grounds. So the record will not support, and no court has ever found, that the ditches in this case "re-diverted" a stream.

navigable water, which, indeed, an ordinary person would consider "open."[6]

The government's argument that the term "open water" is "a shorthand for 'rivers, streams, and other hydrographic features....,'" Opp. 15, does not help it. The roadside ditch at issue cannot reasonably be grouped in the same category as a river or stream. Indeed, the phrase "open water" is used in a variety of regulatory contexts, none of which remotely resemble this roadside ditch.[7] No ordinary person coming upon the roadside ditch would believe he had reached open water.

D. Deference. The government's claim that the Fourth Circuit "correctly deferred to the expert agencies' construction of the CWA as encompassing wetlands adjacent to tributaries of traditional navigable water" is wrong on multiple levels. Opp. at 20. First, the "eventually flows" test advanced by the government and adopted by the court below is not the work of the "expert agencies." It is a litigation position and thus warrants no deference.

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[6] Lest there be any doubt about the character of Black Creek, in June 2003, it was reported to have experienced a "boat jam." *Boat Jam*, The Macomb Daily, June 23, 2003, *available at* http//www/zwire.com/site/news.cfm?newsid=8560595&BRD=988&PAG=461&dept_id=141265&rfi=8. The roadside ditch at issue here has never experienced a boat jam, or, indeed, a boat.

[7] Other agencies have used similar commonsense definitions. *See, e.g.*, 14 C.F.R. § 91.305 (FAA regulations, restricting persons test flying aircraft "except over open water, or sparsely populated areas); 15 C.F.R. Pt. 921, App. II (2003) (NOAA regulations, defining volcanic estuaries as "coastal bodies of open water...."); 40 C.F.R. § 125.83 (EPA regulations, stating "[l]ake or reservoir means any inland body of open water with some minimum surface area free of rooted vegetation...."); 43 C.F.R. Pt. 11, App. II (Interior Department regulations, defining "landward open water" as "a body of water that does not contain vegetation, (e.g., wetland, seagrass, or kelp))"; 49 C.F.R. § 176.415(c)(4) (Department of Transportation regulations, stating that facilities at which flammable solids are loaded or unloaded "must be located so that each vessel...has an unrestricted passage to open water").

The "eventually flows"/"any connection" theory of jurisdiction is not found anywhere in the regulations. Nor has there been a rulemaking to provide an informed foundation for it. By contrast, the *Riverside* court cited an extensive rulemaking record, developed over years of public comment, showing specifically that "adjacent" wetlands provide filtration, flood control, and biological functions to the aquatic ecosystem. *Riverside,* 474 U.S. at 134-135. That kind of record is missing here.

At its core, the "eventually flows" test, which the government justifies by reference to the "hydrologic cycle," amounts to a categorical rule that allows federal regulation with no discernible limit. As such, it tests the outer limits of Congress's constitutional powers and thus can only be sustained by a "clear indication that Congress intended that result." *SWANCC*, 531 U.S. at 172. Tellingly, nowhere in its Opposition does the government respond to the Deatons' argument that a clear statement is required here. Pet. 23-27. Nor does it mention that the ditch at issue here is owned by the county roads department and feeds into a series of ditches managed by a local Public Drainage Association chartered under Maryland law, nor that the Court in *SWANCC* stressed Congress's intent in § 1251(b) of the CWA to "preserve, and protect the primary responsibilities and rights of states to . . . plan the development and use . . . of land and water resources." *SWANCC* requires a clear statement, not deference.

III. Constitutional Issues

The government leads its Commerce Clause arguments with a vague over-generalization. It argues that "the CWA may constitutionally be applied to nonnavigable tributaries and their adjacent wetlands" without "case-specific proof of harm to traditional navigable waters." Opp. 22-23. But this case is not about whether an activity (placing a pollutant in a nonnavigable tributary) may be regulated because it causes the discharge of a pollutant to a truly "navigable water" (such as the Wicomico River). Rather, it is about whether the federal government may federalize a place (in this case a remote roadside ditch), thereby

requiring a CWA permit for any placement of dirt, even if it reaches no farther than the wetland area or the ditch next to it.[8] The government claims that it may, and the Fourth Circuit agreed. As a result, the ditch rather than traditional navigable waters is the trigger for Commerce Clause authority. Thus, in the hands of the Fourth Circuit and of the federal government, Congress's "commerce power over navigation"—the constitutional authority for the CWA (*see SWANCC,* 531 U.S. at 165 n.2)—has become an afterthought rather than the premise for regulation.

The government also argues that to deprive the Corps of discretion to regulate activities such as the Deatons' would "severely undermine[]" the "regulatory regime." Opp. 25. The government offered that same argument in *SWANCC,* to no avail.[9]

Finally, the government does not squarely respond to the Deatons' argument that the Fourth Circuit erred in importing the "aggregation" principle—a concept

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[8] Thus, *United States v. Ashland Oil & Transp. Co.*, 504 F.2d 1317 (6th Cir. 1974), is beside the point. The Sixth Circuit did not hold that the nonnavigable stream where an oil spill occurred was *itself* a "navigable water." Rather, noting that drops of oil "carry no fingerprints," and the government "could not possibly prove which polluter discharged" oil found in a navigable river (precepts now outdated), *id.* at 1329, it held that the government can regulate the pollution of nonnavigable tributaries to "preserv[e] the navigability and the quality of the navigable waters." *Id.* at 1328. *Ashland* authorized the regulation of the activity (discharges), not the wholesale federalization of the nonnavigable waterbody. Here, the government is not content to regulate pollutant discharges from the roadside ditch to navigable waters. It wants to federalize the ditch, and thus control activities in and adjacent to the ditch regardless of how tenuous their relation to navigable waters. The government's other cases are similarly unavailing. *See, e.g., United States v. Hartsell*, 127 F.3d 343, 349 (4th Cir. 1997) (Congress has constitutional power to require permits under 33 U.S.C. § 1317 for the "discharge of pollutants into public sewers which would eventually flow into streams and rivers;" no finding that the sewer system *itself* was a "navigable water").

[9] See Federal Respondents Br., *SWANCC v. U.S. Army Corps of Eng'rs,* 531 U.S. 159 (2001), No. 99-1178, at 44.

applicable to a "substantial effects" analysis—into its "channels" analysis. *See* Pet. 19-21. The government advances the non sequitur argument that none of the cases cited by the Deatons "hold that Congress is foreclosed from relying on aggregate effects when deciding whether ... to protect the channels of commerce ... from potentially harmful upstream activities." Opp. 25. But a regulated activity is either in a channel of commerce (and thus subject to regulation under Congress's channels power) or it is not; no amount of aggregation of activities outside of a channel of commerce will place the activities inside the channel. Nor does the government cite a single case where a court relied on aggregation outside of a "substantial effects" analysis. *See Citizens Bank v. Aalfabco*, Inc, 123 S.Ct. 2037, 2040 (2003) (aggregation principle used to determine whether individual debt-restructuring transactions, *i.e.*, intrastate transactions, had a substantial effect on interstate commerce). The Fourth Circuit "has decided an important federal question in a way that conflicts with relevant decisions of this Court." Supreme Court Rule 10(c). Certiorari is warranted on this basis as well.

CONCLUSION

For all the reasons set forth above and in the Petition, the Court should grant certiorari.

February 11, 2004

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No. 03-701

In The

Supreme Court of the United States

JAMES S. and REBECCA DEATON,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to
The United States Court of Appeals for the Fourth Circuit

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After the Deatons filed their Reply Brief, the United States General Accounting Office (GAO) released a report assessing the Corps's CWA jurisdictional practices. *See* Report to the Chairman, Subcommittee on Energy Policy, Natural Resources and Regulatory Affairs, Committee on Government Reform, House of Representatives, *Waters and Wetlands: Corps of Engineers Needs to Evaluate Its District Office Practices in Determining Jurisdiction,* GAO-04-297 (Feb. 27, 2004).[1] The GAO Report documents the different and often contradictory approaches, both among and within the Corps's districts, regarding whether a particular feature qualifies as a "tributary" (*id.* at 20-22) or an "adjacent" wetland (*id.* at 17-20), under the CWA.[2] The GAO Report also concludes that there is no consistency within the Corps on whether ditches and other man-made conveyances are subject to federal regulation. *Id.* at 22-26. The Supplemental Brief in *Newdunn Assocs. LLP v. U.S. Army Corps of Eng'rs* (No. 03-637, filed March 7, 2004), provides more specific examples from the GAO Report, and we respectfully cross-reference that submission.

The GAO Report refutes the Corps's claim here that it is "entitled to judicial deference" (U.S. Br. 20). GAO recognized that "[t]he federal government has argued in court" that it may regulate nonnavigable ditches as

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[1] Available at http://www.gao.gov/new.items/d04297.pdf (last visited March 17, 2004).

[2] *See, e.g.,* GAO Report at 3 ("Districts apply different approaches"); *id.* ("differences in identifying jurisdictional limits"); *id.* at 4 (districts need "[t]o provide greater clarity to the regulated community"); *id.* at 18 ("districts varied"); *id.* at 20 (districts "could differ significantly"); *id.* at 23 ("three different district staff" would probably make "three different assessments"); *id.* at 25 ("contrast" among districts).

tributaries "because any pollutant or fill material that degrades water quality in a tributary has *the potential* to move downstream and degrade the quality of navigable waters themselves." GAO Report at 7 (emphasis added).[3] But GAO also found that the Corps's actual practices in the field vary significantly from the litigation position it has advanced to the courts. The Fourth Circuit, unaware of the rampant administrative inconsistencies, determined that "deference is appropriate" (Pet. App. 21a), and held that "the word 'tributaries'... means what the Corps says it means." (*Id.* 20a). But the GAO Report shows that the Corps does not know what the word "tributary" means, nor how to identify a "tributary" (or an "adjacent" wetland). Furthermore, GAO found that few Corps districts actually disclose "their practices for making jurisdictional determinations" to the public. GAO Report at 27. Notwithstanding this lack of fair notice, the Corps persists in pursuing enforcement actions against citizens like the Deatons.

Thus, we are left with an inconsistent patchwork of jurisdictional determinations, and a government litigation position that is unsupported by any rulemaking record or other documentation. As the Deatons have argued, this type of ad hoc decisionmaking is precisely the kind of situation where *Chevron* deference is *not* due. (Pet. 25-28.) The situation here stands in sharp contrast to *Riverside Bayview,* where an administrative record, developed after years of notice and comment rulemaking, supported the

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[3] The language used by GAO to characterize the Corps's position is taken verbatim from the Fourth Circuit's commerce clause analysis in *Deaton. See* Pet. App. 13a ("Any pollutant or fill material that degrades water quality in a tributary of navigable waters has the potential to move downstream and degrade the quality of the navigable waters themselves").

Corps's jurisdiction over adjacent wetlands that actually abut truly navigable waters. (Pet. 27 n. 12.)

As the Deatons point out, the Fourth Circuit should have followed *SWANCC* and searched for a clear statement (which does not exist) that Congress intended to regulate the roadside ditch at issue as a "navigable water." (Pet. 23-25.) Instead, the Fourth Circuit bypassed the clear statement rule and extended *Chevron* deference. The GAO Report confirms that affording such deference to the Corps was erroneous.

With no rulemaking forthcoming from the agencies, the only chance for greater clarity on the scope of "navigable waters" rests with this Court.

CONCLUSION

The petition for a writ of certiorari should be granted

March 18, 2004

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Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF AMICUS CURIAE OF THE BEAVER DAM PUBLIC DRAINAGE ASSOCIATION AND JOHN A. RAPANOS IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A three-foot wide roadside drainage ditch runs alongside the property of James and Rebecca Deaton in rural Wicomico County, Maryland. The roadside ditch was built and is maintained by the county roads department and connects to a ditch system operated by a public drainage association established under state law to address local drainage problems. The Deatons dug a ditch on their property and, in doing so, disturbed an area the United States Army Corps of Engineers considers a wetland. There is no showing that common dirt—the pollutant at issue—left the Deatons's property, flowed into the roadside ditch, or reached any truly navigable waters.

The questions presented are:

1. Are the roadside ditch and the wetland next to it "navigable waters" under the Clean Water Act?

2. Where activity in a wetland has not degraded either a nonnavigable roadside ditch next to the wetland or a downstream traditional navigable water, does Congress's commerce power over navigation allow federal regulation of that wetland or that roadside ditch?

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INTEREST OF AMICI CURIAE

Pursuant to Supreme Court Rule 37.2, the Beaver Dam Public Drainage Association (Beaver Dam) and John A. Rapanos submit this brief amicus curiae in support of James and Rebecca Deatons's petition for a writ of certiorari.[1] Written consent for amicus participation in this case was granted by counsel of record for all parties. Letters of consent have been lodged with the clerk of the Court.

Beaver Dam Public Drainage Association

Beaver Dam is one of over 100 public drainage associations (PDAs) on the Eastern Shore of Maryland empowered by state statute to regulate local "ditches, drains or canals" for the benefit of the public. *See* Md. Code Ann. art. 25, § 52(a) (2003). The primary purpose of public drainage associations is to develop plans for watersheds "for agricultural drainage and soil conservation to promote optimal crop production by establishing and maintaining watershed drainage systems conducive to public health, convenience, and welfare." *See* Md. Code Ann. art. 25, § 67(a) (2003). This type of land drainage is vital to Maryland's Eastern Shore agricultural economy and is needed to assure predictability of planting and harvesting. *See* Wayne H. Bell, Philip Favero, and Public Drainage Task Force, *Moving Water: A Report to the Chesapeake Bay Cabinet*, at 17 (2000), *available at* http://www.dnr.state.md.us/bay/tribstrat/public_drainage_report.pdf (*Moving Water*). An important goal of the Maryland Department of Natural Resources is to develop local strategies to protect property owners who depend on public drainage

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[1] Pursuant to Supreme Court Rule 37.6, amici affirm that no counsel for any party in this case authored this brief in whole or in part; and, furthermore, that no person or entity has made a monetary contribution specifically for the preparation or submission of this brief.

while also protecting environmental interests, such as wetlands, affected by public drainage. *Id.* at 1-2; Appendices B and C.

Beaver Dam oversees a network of drainage ditches in Wicomico County that is connected to the roadside ditch the Fourth Circuit found subject to federal regulatory authority under the Clean Water Act (CWA), 33 U.S.C. § 1251, *et seq.*, in this case. That determination undermines the State's soil and water conservation efforts and interferes with local land use management decisions. With its narrowly focused federal enforcement scheme, the CWA serves a different purpose than Maryland's public drainage program and does not consider or balance the competing environmental and economic interests State and local governments must address. The Fourth Circuit decision would effectively displace local water control programs with a conflicting federal scheme. Therefore, Beaver Dam has a direct interest in the outcome of this case.

John A. Rapanos

John A. Rapanos is an individual property owner who owns a 175-acre parcel in Williams Township, Michigan. This parcel contains isolated, nonnavigable, intrastate wetlands, on which Mr. Rapanos placed sand to enhance his property for sale and development. The nearest navigable water to Mr. Rapanos's land is the Kawkawlin River, approximately 20 miles away. Thus, the wetlands on Mr. Rapanos's property do not physically abut any navigable water.

Mr. Rapanos placed sand in the wetlands on his property without a federal permit. As a result, he was prosecuted by the federal government and convicted in 1995 of two counts of "discharging pollutants into waters of the United States" without a permit in violation of section 301(a) of the CWA. *See* 33 U.S.C. § 1311(a). Mr. Rapanos appealed his conviction on jurisdictional grounds, but the conviction was upheld by the Sixth Circuit. *United States v. Rapanos*, 235 F.3d 256 (6th Cir.

2000). This Court, however, granted Mr. Rapanos's writ of certiorari and remanded the case in light of *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001) (*SWANCC*). *Rapanos v. United States*, 533 U.S. 913 (2001) (mem.).

Despite this Court's decision in *SWANCC* limiting the scope of the CWA to traditional navigable waters and adjacent wetlands, the Sixth Circuit followed the Fourth Circuit decision in this case and held that the isolated wetlands on Mr. Rapanos's property are subject to federal control. *United States v. Rapanos*, 339 F.3d 447, 448-49, 452-53 (6th Cir. 2003). Mr. Rapanos has filed another petition for a writ of certiorari to this Court asking for review of the Sixth Circuit's decision. *See Rapanos v. United States*, Docket No. 03-929. Mr. Rapanos's case raises federal jurisdictional issues identical to the Deatons's and to those raised in *Treacy v. Newdunn Associates, LLP*, 344 F.3d 407 (4th Cir. 2003), another case currently on petition to this Court for a writ of certiorari. *See Newdunn Associates, LLP v. United States Army Corps of Engineers*, Docket No. 03-637. Therefore, Mr. Rapanos has a direct interest in the outcome of this case.

STATEMENT OF THE CASE

In this case, the Fourth Circuit held that the federal government had jurisdiction under the Clean Water Act over a three-foot wide, nonnavigable, intrastate roadside drainage ditch and nearby wetlands. *See United States v. Deaton*, 332 F.3d 698, 702-03 (4th Cir. 2003). The ditch and road border a 12-acre parcel owned by James and Rebecca Deaton. *Id.* at 702. The Deatons bought the property to build a small residential subdivision. *Id.* To make the land suitable for residential building, they dug a trench to drain water to comply with state and local requirements for septic disposal systems. *Id.*

The government claimed that the trenching in this area of the property resulted in placement of fill into wetlands and was therefore subject to regulation under the CWA because the wetlands lie adjacent to the roadside ditch which the government characterized as a tributary to a distant navigable water. *Id.* The ditch flows intermittently via a thirty-two mile path along a twisting series of nonnavigable watercourses to the Chesapeake Bay. *Id.* The nearest navigable waterway is the Wicomico River about eight miles from the Deatons's property. *Id.* at 702. In exercising its putative jurisdiction, the government ordered the Deatons to stop developing their land and sued them to enforce the order. *Id.* at 703. The district court initially disagreed with the government's assertion of jurisdiction and granted summary judgment for the Deatons. However, the Fourth Circuit overruled the district court and remanded the case. *Id.*

While the remand was pending, this Court decided *SWANCC* in which it held that the Clean Water Act does not cover isolated, nonnavigable, intrastate waters. *SWANCC*, 521 U.S. at 172-74. But the district court read the decision narrowly and found that the Deaton property was subject to federal regulation under the CWA and must be restored to its natural state. *Deaton*, 332 F.3d at 711, 714. On appeal, the Fourth Circuit affirmed the district court decision concluding that federal regulation of wetlands not abutting a navigable water was authorized under the CWA and *SWANCC*. *Deaton*, 332 F.3d at 708-12. The court of appeals also affirmed the district court decision against the Deatons's Commerce Clause challenge. *Id.* at 705-08.

Relying on *Wickard v. Filburn*, 317 U.S. 111 (1942), the Fourth Circuit held that Congress could regulate all trivial discharges, like the discharge on the Deatons's property, because of the possible "aggregate effect" of such discharges on navigable waters. *Deaton*, 332 F.3d at 707. Based on that

determination, the Fourth Circuit concluded that federal regulation of nonnavigable waters, like the remote wetlands and the distant roadside ditch in this case, neither invoked the outer limits of the Commerce Clause nor upset the federal-state balance but fit well within the scope of the CWA and the power of Congress to protect navigable waters. *Id.* at 707-08.

SUMMARY OF THE ARGUMENT

The Fourth Circuit opinion in this case is at odds with the intent expressed in the CWA by Congress that federal regulation not impinge on state and local control over land and water use. In effect, the Fourth and Sixth Circuit's interpretation of CWA jurisdiction allows the federal regulatory scheme to displace state and local water and soil conservation programs that serve different goals, balancing competing local environmental and economic interests. This is in conflict with the Constitution's explicit preservation of distinct state and federal spheres. *See* U.S. Const. art. I, § 8 (enumerating the powers granted to the federal government); amend. X (stating "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the States, respectively, or to the people"). Therefore, this Court should grant the petition for a writ of certiorari to maintain the constitutional balance between federal and state power so necessary for the preservation of individual liberty. *See Gregory v. Ashcroft*, 501 U.S. 452, 458-59 (1991) (discussing the concept of divided sovereignty and finding "In the tension between federal and state power lies the promise of liberty.").

Moreover, the Fourth Circuit decisions in this case and *Newdunn*, and the Sixth Circuit decision in *Rapanos*, are in direct conflict with the Fifth Circuit decisions in *Rice v. Harken Exploration Co.*, 250 F.3d 264 (5th Cir. 2001), and *In re Needham*, No. 02-30217, 2003 WL 22953383 (5th Cir. Dec. 16,

2003), regarding the extent of federal jurisdiction under the CWA. In *SWANCC*, this Court decided that federal jurisdiction under the CWA could not extend to isolated, nonnavigable, intrastate waters that do not abut a navigable-in-fact water. Were the CWA to be interpreted to reach so far, this Court found, it would call into question the Act's constitutionality under the Commerce Clause. Despite *SWANCC*, however, the Fourth and Sixth Circuits have interpreted the CWA to allow federal jurisdiction over isolated, nonnavigable, intrastate waters that do not abut a navigable water.

The Fourth Circuit also misapplied the so-called aggregation doctrine, which this Court limited in *United States v. Lopez*, 514 U.S. 549 (1995), and *United States v. Morrison*, 529 U.S. 598 (2000). The lower court aggregated the effects of trivial, noneconomic, intrastate soil discharge activities to find a connection to navigable waters, and hence interstate commerce, that does not exist. This decision is representative of a growing trend among the lower federal courts of abusing the aggregation doctrine to extend federal jurisdiction over wholly intrastate, noneconomic activities with no meaningful connection to interstate commerce. Therefore, this Court should grant certiorari to address the misuse of the aggregation doctrine by the federal courts.

ARGUMENT

I

THIS COURT SHOULD GRANT THE PETITION BECAUSE THE FOURTH CIRCUIT'S DECISION ALLOWS A FEDERAL REGULATORY SCHEME WITH CONFLICTING GOALS TO DISPLACE STATE AND LOCAL REGULATORY PROGRAMS THAT SEEK TO BALANCE COMPETING ECONOMIC AND ENVIRONMENTAL INTERESTS

Land and water use are traditionally and primarily within the power of the states as a constitutional matter. *See SWANCC*, 531 U.S. at 174. Intermittent collections of non-navigable intrastate waters implicate local interests far more than national interests. States, such as Maryland, and their designated local authorities, such as Amicus Beaver Dam Public Drainage Association, have better knowledge of the function and value of isolated, nonnavigable, intrastate waters than the federal government. *See* Jonathan H. Adler, *Wetlands, Waterfowl, and the Menace of Mr. Wilson: Commerce Clause Jurisprudence and the Limits of Federal Wetland Regulation*, 29 Envtl. L. Rev. 1, 51-52 (1999). Local entities can weigh the value of particular isolated, intrastate wetlands and waters against other important local values such as flood mitigation, drainage, crop irrigation, and public health. *Id.* Local regulatory programs, like those carried out by Maryland's system of public drainage associations, have been developed to regulate such waters to serve the economic and environmental interests of the state and its citizens. Effective local programs of this type should not be lightly displaced by a conflicting federal regulatory scheme.

Beaver Dam is one of several PDAs within Wicomico County and one of over 100 PDAs controlling and managing drainage to promote agriculture, protect land values, and improve public health. In 1964, property owners within a

discrete area of Wicomico County discovered their lands and livelihoods were being adversely affected by high ground water levels. Therefore, following Maryland law, they formed a citizens group and, after a four year study of the need for surface and ground water drainage in their area, petitioned Wicomico County to form the Beaver Dam Public Drainage Association. Md. Code Ann. art. 25, § 53(a) (2003). Beaver Dam's service area includes the land of 318 owners, encompassing 2,490 acres, drained by 7.74 miles of ditches. Land owners served pay assessments to Beaver Dam, which vary depending on the size of the parcel, and if unpaid become liens on their property. Md. Code Ann. art. 25, § 73 (2003). The assessments allow Beaver Dam to maintain its drainage system to control the watershed within its drainage area. *Id.*

Each PDA must have a watershed work plan and is controlled by a board of managers elected by property owners within the drainage area serviced by the PDA. Md. Code Ann. art. 25, §§ 58, 68 (2003). Thus, local property owners, such as the Deatons, within Beaver Dam's drainage area, are assessed a fee for the PDA's services and can hold the PDA accountable for problems caused by its management of the local watershed. Conversely, Beaver Dam—as a local entity with a discrete control area and a specific mission to manage the local watershed to promote agriculture, public health, and soil conservation, and to conserve natural resources and prevent pollution—is uniquely situated to respond to local problems. Md. Code Ann. art. 25, § 67(a) (2003); Md. Regs. Code tit. 15, § 20.01.01 (2003). *See* Jonathan H. Adler, *The Green Aspects of* Printz: *The Revival of Federalism and its Implications for Environmental Law*, 6 Geo. Mason L. Rev. 573, 577 (1998) (*Green Aspects*) (noting many state environmental programs pre-date federal schemes, which tend to conflict with the established state schemes' regulatory goals); Richard H. McNeer, *Nontidal Wetlands Protection in Maryland and*

Virginia, 51 Md. L. Rev. 105, 117 (1992) (arguing that state regulation of intrastate, isolated wetlands is vital to preserving such lands because the federal attempts under the CWA have not been effective); Stephen R. Rubin, Note, *An Analysis of Nontidal Wetland Regulation in Maryland*, 16 Va. Envtl. L.J. 459, 495-96 (1997) (noting Maryland is a leader in wetlands protection and that federal solutions for wetland preservation are not as effective as state schemes).

Maryland's local solutions for its local water problems serve a different purpose than the federal CWA, which is a centralized regulatory scheme to control the integrity of the "Nation's waters." 33 U.S.C. § 1251(a). Congress recognized this difference and acknowledged it in the Act. An explicit objective of Congress in promulgating the Clean Water Act was to "recognize, preserve, and protect the primary responsibilities and rights of States . . . to plan the development and use . . . of land and water resources." 33 U.S.C. § 1251(b). But, it has not worked out like that.

The Environmental Protection Agency and the Army Corps of Engineers, the agencies charged with enforcing the CWA, are committed to a "no net loss" of wetlands policy. Royal C. Gardner, *The Army-EPA Mitigation Agreement: No Retreat from Wetlands Protection*, 20 Envtl. L. Rep. 10337 (Aug. 1990); News Release, EPA, *Administration to Reaffirm Commitment to No Net Loss of Wetlands and Address Approach for Protecting Isolated Waters in Light of Supreme Court Ruling on Jurisdictional Issues*, Jan. 10, 2003, *available at* http://www.epa.gov/owow/wetlands/ANPRM-PRESS.pdf (accessed Jan. 22, 2004). This policy values preserving all wetlands in the United States and places little value on draining such lands. Gardner, 20 Envtl. L. Rep. 10337. The federal government regulates accordingly, requiring those property owners subject to federal jurisdiction to demonstrate that there is no "practicable alternative" to altering or filling a wetland.

40 C.F.R. § 230.10. The federal government's "no net loss" goal has created conflict with state programs in nearly every case in which property owners contest a federal wetland decision. Oliver A. Houck and Michael Rolland, *Federalism in Wetlands Regulation: A Consideration of Delegation of Clean Water Act Section 404 and Related Programs to the States*, 54 Md. L. Rev. 1242, 1253 (1995).

This case is an example of that conflict. The public drainage system in Maryland values draining what is predominantly farm land in order to facilitate timely planting and harvesting. *Moving Water*, *supra*, at 15, 29. Under *Deaton* and *Rapanos*, the federal government can displace this local program, and others, as both the Fourth and Sixth Circuits have allowed federal regulation of every wet place in North Carolina, South Carolina, Virginia, Maryland, West Virginia, Kentucky, Michigan, Ohio and Tennessee. Both courts found that control over navigable-in-fact waters meant federal regulation over "the whole tributary system" of such waters, as far upstream as the water flows, was permissible under the CWA. *Deaton*, 332 F.3d at 712; *Rapanos*, 339 F.3d at 452. Thus, expansive federal jurisdiction under the CWA intrudes into areas of traditional state concern and prevents states from balancing competing priorities such as the interests of conservation with those of economic development and prosperity. *See* Richard L. Revesz, *Federalism and Environmental Regulation: A Public Choice Analysis*, 115 Harv. L. Rev. 553, 583, 630-32 (2001) (finding states are innovative in balancing such competing interests, acting where the federal government cannot or will not).

A decision from this Court that provides a clearer understanding of the limits of CWA jurisdiction will allow states the ability to continue to balance such interests. The Association of State Wetlands Managers found several states, including Maryland, provide considerable protection for "isolated intrastate waters" not subject to federal CWA

jurisdiction according to the limited interpretation of the CWA rejected by the Fourth and Sixth Circuits. Robin Kundis Craig, *Beyond* SWANCC, *The New Federalism and Clean Water Act Jurisdiction*, 33 Envtl. L. 113, 137 (2003). Other states, following *SWANCC*'s clarification of state and federal regulatory spheres with respect to wetlands, have acted to expand their water quality programs to specifically address isolated, nonnavigable, intrastate wetlands. *Id.*

Under the opinion below, local regulatory entities like Amicus Beaver Dam know that ultimately their decisions are subject to abrogation at the whim of the federal government. The incentive to develop long range plans to manage isolated, intrastate waters is greatly lessened. The central planning ushered in by the Fourth Circuit's decision in this case displaces local programs, like Maryland's PDA system, that regulate isolated, nonnavigable, intrastate waters in a manner that balances environmental and economic interests. Adler, *Green Aspects* 6 Geo. Mason L. Rev. at 577, 580-82.

In its zeal to enforce the Clean Water Act, the federal government has disrupted the delicate balance between state and federal power created by the Constitution to reduce the tyranny a central government would impose on individuals. *See Gregory*, 501 U.S. at 458. Centralized control over the citizens, lands, and waters of the United States was rejected by the Framers in order to preserve liberty. *See Printz v. United States*, 521 U.S. 898, 920 (1997); The Federalist, No. 45 at 292-93 (Clinton Rossiter ed. 1961). But the Fourth Circuit decision in this case shifts the balance of power to the federal government in a way that undermines local control of land and water use. If allowed to stand, the decision precludes a meaningful balancing of competing environmental and economic interests that only the state and local programs can accomplish.

II

THIS COURT SHOULD GRANT THE PETITION TO RESOLVE THE CONFLICT IN THE FOURTH, FIFTH, AND SIXTH CIRCUITS OVER THE SCOPE OF CLEAN WATER ACT JURISDICTION

In *SWANCC*, this Court concluded that federal regulation under the CWA of wholly intrastate wetlands not abutting a traditional navigable water was beyond the reach of the Act and could exceed the limits of federal power under the Commerce Clause. *SWANCC*, 531 U.S. at 172-74. Despite this, the Fourth and Sixth Circuits have found that federal jurisdiction could extend to isolated, intrastate, nonnavigable wetlands based on a tenuous and intermittent hydrological connection between the wetlands and navigable-in-fact waters. *See Deaton*, 332 F.3d at 702, 707-08; *Rapanos*, 339 F.3d at 449-53. Both circuits have concluded that federal regulation of a wholly intrastate wetland not abutting a navigable water fit "comfortably within Congress's authority to regulate navigable waters." *Deaton*, 332 F.3d at 705. *See Rapanos*, 339 F.3d at 452-53 (relying extensively on *Deaton*). In contrast, however, the Fifth Circuit has found, like this Court in *SWANCC*, that CWA jurisdiction extends only to navigable waters and waters adjacent thereto.

In *Rice v. Harken Exploration Co.*, 250 F.3d 264, an action was brought against Harken Exploration Company under the Oil Pollution Act (OPA) for oil spills on Rice's property in Hutchinson County, Texas. The OPA imposes strict liability on parties responsible for discharging oil into "navigable waters," defined as "waters of the United States." *Id.* at 266-67. Because of the similarity in language used in the OPA and the Clean Water Act, the Fifth Circuit relied on cases interpreting the term "navigable waters" under the CWA.

The Fifth Circuit began its analysis with *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985), noting

that this Court had adopted an expansive reading of "navigable waters" under the CWA. *Rice*, 250 F.3d at 268. But the court concluded that under *SWANCC* this Court had more recently "limited the scope of the CWA." *Id.*

The Fifth Circuit observed that in *SWANCC*, this Court had "distinguished *Riverside Bayview Homes* on the ground that in that case the wetlands in question were adjacent to a body of open water that was actually navigable" and that the term "navigable waters" had to have some effect. *Rice*, 250 F.3d 264. Based on its reading of *SWANCC*, therefore, the Fifth Circuit declined to characterize a small seasonal creek as "waters of the United States" subject to federal regulation under either the Clean Water Act or the OPA, even though the creek flowed intermittently into the Canadian River, a "navigable water." "Instead," the court held: "[A] body of water is protected under the Act only if it is actually navigable or is adjacent to an open body of navigable water." *Id.* at 270.

More recently, the Fifth Circuit affirmed its holding in *Rice* and expressly rejected the Fourth Circuit's interpretation of CWA jurisdiction in this case, as well as the Sixth Circuit's interpretation in *Rapanos*. In *In re Needham*, 2003 WL 22953383, the Fifth Circuit was again required to determine the scope of "navigable waters" under the Oil Pollution Act and, as in *Rice*, the Fifth Circuit relied on *SWANCC* for its determination.

In *In re Needham*, the government argued that the definition of navigable waters "covers all waters, excluding groundwater, that have any hydrological connection with 'navigable water.'" *Id.* at *3. The Fifth Circuit noted that at least two appellate courts had agreed with this interpretation: the Sixth Circuit decision in *Rapanos* and the Fourth Circuit decision in this case. *In re Needham*, 2003 WL 22953383 at *3.

But the Fifth Circuit expressly rejected this interpretation, stating that the government's definition of navigable waters "is unsustainable" under *SWANCC*. *Id.* According to the court, the CWA and OPA do not permit the federal government to regulate "tributaries," including wetlands, that are neither navigable in fact nor adjacent to such waters. *Id.*

> Consequently, in this circuit the United States may not simply impose regulations over puddles, sewers, roadside ditches and the like; under [*SWANCC*] "a body of water is subject to regulation . . . if the body of water is actually navigable or adjacent to an open body of navigable water."

Id. (*quoting Rice*, 250 F.3d at 269.)

The Fifth Circuit went on to say that the interpretation of "navigable waters" suggested by the government—which had been adopted by the Sixth Circuit in *Rapanos* and the Fourth Circuit in this case—would push "the outer limits of the Commerce Clause and raise serious constitutional questions." *In re Needham*, 2003 WL 22953383 at *5, n.8.

III

THIS COURT SHOULD GRANT THE PETITION TO ADDRESS THE MISUSE OF THE AGGREGATION DOCTRINE BY THE LOWER FEDERAL COURTS EXEMPLIFIED BY THE FOURTH CIRCUIT'S APPLICATION OF THE DOCTRINE TO ISOLATED, NONNAVIGABLE, INTRASTATE WATERS

Against a Commerce Clause[2] challenge to federal CWA jurisdiction, the Fourth Circuit relied on the "aggregation doctrine" to authorize federal regulation of the sometime standing waters on the Deatons's property. The aggregation doctrine derives primarily from *Wickard v. Filburn*, 317 U.S. 111 (1942). Under *Wickard*, federal regulation of wholly intrastate noneconomic activities has been approved by the courts based on the purported effects such activities could exert on interstate commerce when aggregated.

In *Wickard*, the Court found that the federal government could regulate wheat grown on a farm for home consumption, even though such home-grown wheat by itself had a *de minimis* effect on interstate commerce. *Id.* at 128-29. The Court reasoned that federal regulation of growing and consuming wheat was proper because home-grown wheat in the aggregate was a large amount that could enter the market and have a "substantial influence on price and market conditions." *Id.* at 128. Under the aggregation doctrine, federal regulatory power under the Commerce Clause greatly expanded, allowing federal regulation of just about anything. *See* Richard A. Epstein, *Propter Honoris Respectum, Constitutional Faith and the Commerce Clause*, 71 Notre Dame L. Rev. 167, 188-89 (1996).

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[2] *See* U.S. Const. art. 1, § 8, cl. 3 (providing "The Congress shall have power . . . to regulate commerce with foreign nations, and among the several states, and with the Indian tribes;").

Two recent decisions of this Court, however, attempted to limit federal regulatory power under the Commerce Clause generally and *Wickard* specifically. In *United States v. Lopez* and *United States v. Morrison,* this Court invalidated federal laws that attempted to regulate wholly intrastate noneconomic activities that had, at best, only attenuated effects on interstate commerce. These cases both turned on the nature of the activity: "[A] fair reading of *Lopez* shows that the noneconomic, criminal nature of the conduct at issue was central to our decision in that case . . . . 'Even *Wickard*, which is perhaps the most far reaching example of Commerce Clause authority over intrastate activity, involved economic activity . . . . '" *Morrison*, 529 U.S. at 610.

In *Lopez*, this Court struck down the Gun Free School Zones Act because the regulated activity—possession of a gun in a school zone—had nothing to do with economic activity and did not substantially affect interstate commerce. *Lopez*, 514 U.S. at 551, 559-68. In *Morrison*, this Court invalidated provisions of the Violence Against Women Act that allowed victims of "gender-motivated violence" to sue in federal court. *Morrison*, 529 U.S. at 601-02; 627. This Court found that physical attacks by one person against another, a wholly intrastate activity, was not economic activity on its face and did not substantially affect interstate commerce and, therefore, could not be regulated by Congress under the Commerce Clause. *Id.* at 614-19.

Both *Lopez* and *Morrison* strongly affirmed that federal power under the Commerce Clause was limited in order to prevent the federal government from becoming one of general powers. *Lopez*, 514 U.S. at 559-68; *Morrison*, 529 U.S. at 617-19. These cases prohibit the federal government from aggregating noneconomic intrastate activities, like the filling of isolated, nonnavigable, intrastate waters at issue in this case, that have only an attenuated connection to interstate commerce

and obliterate the "distinction between what is truly national and what is truly local." *Lopez*, 514 U.S. at 567-68. But the lower courts fail to heed this Court's teachings in *Lopez* and *Morrison* that there are limits to the commerce power. The Fourth Circuit opinion in this case is a prime example of the lower court trend to apply the aggregation doctrine to find ever weaker links to interstate commerce to extend federal regulatory power.[3]

While granting that the Deatons's ditch digging activities were "too trivial to affect water quality in navigable waters," the Fourth Circuit found that Congress could regulate such activities because of their nationwide, aggregate effects. *Deaton*, 332 F.3d at 707. Although the aggregation doctrine is applied to establish a substantial effect on interstate commerce, the Fourth Circuit compounded its analytical error by relying on cases that have nothing to do with substantial effects. For example, the court relied on cases such as *Champion v. Ames*, 188 U.S. 321 (1903), in which this Court approved a federal law prohibiting the transport of lottery tickets in interstate commerce. *Id.* at 344-45. In *Champion*, the Court reasoned that Congress could prohibit the transfer of tickets in interstate commerce to prevent pollution of interstate commerce by immoral lottery tickets. *Id.* at 357-64. The Fourth Circuit analogized that keeping the channels of interstate commerce free from threatened, "immoral" uses was similar to regulating to keep the Wicomico River clear of any discharge generated by the Deatons's activities that may have entered the river, but only after passing through several nonnavigable channels. *Deaton*,

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[3] Jesse H. Choper, *Taming Congress's Power Under the Commerce Clause: What Does the Near Future Portend?*, 55 Ark. L. Rev. 731 (2003) (arguing that *Lopez* and *Morrison* will not seriously affect the current, extensive reach of federal power because the Court did not limit the aggregation doctrine and other devices for extending federal power over wholly intrastate activities).

332 F.3d at 707. *But see* Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 Va. L. Rev. 1387, 1442 (1987) (concluding that pre New-Deal era Commerce Clause cases such as *Champion* do not stand for the proposition that Congress can regulate any and all intrastate conduct that affects, however remotely, a channel of interstate commerce).

In this case, the record evidence shows that the Deatons's ditching activities did not affect a channel of interstate commerce. *See* Petition for Writ of Certiorari, No. 03-701 at 7-8 (discussing the lack of evidence that the Deatons's ditching activity would exert any effect, let alone a substantial one, on interstate commerce). In fact, the "effect" on commerce the Fourth Circuit found was attenuated at best and hypothetical at worst. *Deaton*, 332 F.3d at 702-03.

The Fourth Circuit's misuse of the aggregation doctrine to expand federal power over wholly intrastate noneconomic activities, like the discharge of soil into a wetland, simply proves Justice Thomas' point in his concurrence in *Lopez*. There, he noted a need to redefine the scope of federal regulation of intrastate activities under the Commerce Clause, finding that the "aggregation principle is clever, but has no stopping point." *Lopez*, 514 U.S. at 600 (Thomas, J., concurring). This case shows how a court "always can draw the circle broadly enough to cover an activity that, when taken in isolation, would not have substantial effects on commerce." *Id.* If this expansive interpretation of federal power under the Commerce Clause is upheld, then "every aspect of human existence" would be subject to federal control in contravention of the Constitution. *Lopez*, 514 U.S. at 600-01 (Thomas, J. concurring).

In the environmental context, some have taken the aggregation doctrine to this extreme, arguing that Congress can aggregate all endangered species to show a substantial effect on

interstate commerce because all species may have some yet unrecognized future value.[4] Arguments like this and the Fourth Circuit's application of the aggregation doctrine to isolated, nonnavigable, intrastate waters in this case to justify expansive federal control only seem plausible to some courts because of the doctrine's limitless nature.

If allowed to stand, the Fourth Circuit's decision would mean that federal regulatory power under the Commerce Clause is virtually unlimited. Just as the highly integrated nature of the national economy does not justify federal regulation of every intrastate activity that could possibly affect interstate commerce, *see Lopez*, 514 U.S. at 567; *Morrison*, 529 U.S. at 617-19, so a "hydrologically" connected aquatic system cannot justify federal regulation over isolated, nonnavigable, intrastate waters.

CONCLUSION

The Clean Water Act did not give the federal government the power to regulate every wet place within the United States. Congress explicitly preserved state control over land and water use and did not mean to displace state programs regulating isolated, nonnavigable, intrastate waters. These state programs serve different goals in order to accommodate competing local environmental and economic interests that the federal scheme does not.

The expansive federal control under the Commerce Clause countenanced by the Fourth Circuit in this case and *Newdunn*

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[4] *See* Arthur B. Mark, III, *Currents in Commerce Clause Scholarship Since* Lopez: *A Survey*, 32 Capital Univ. L. Rev. at _____ (forthcoming 2004) (reviewing scholarship discussing the status of federal environmental law after *Lopez* and *Morrison* and noting that some see the aggregation doctrine as the way to justify federal control under the Commerce Clause over wholly intrastate activities allegedly affecting the environment).

Associates, Docket No. 03-637, and the Sixth Circuit in *Rapanos*, Docket No. 03-929, displaces state control of local land and water issues. If the federal government is empowered by the CWA to regulate isolated, nonnavigable, intrastate waters and wetlands, then there is a serious question as to whether the CWA is a constitutional exercise of Congress's power under the Commerce Clause. The Fourth and Sixth Circuits, like many of the lower federal courts, misused the aggregation doctrine to extend federal power over noneconomic, intrastate activities that have no measurable effect on interstate commerce.

Moreover, the Fourth and Sixth Circuit decisions directly conflict with the Fifth Circuit over the scope of CWA jurisdiction. Therefore, this Court should grant the petition for a writ of certiorari.

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No. 03-701

In The

Supreme Court of the United States

JAMES S. and REBECCA DEATON,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to
The United States Court of Appeals for the Fourth Circuit

BRIEF OF CALIFORNIA FARM BUREAU AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A three-foot wide roadside drainage ditch runs alongside the property of James and Rebecca Deaton in rural Wicomico County, Maryland. The roadside ditch was built and is maintained by the county roads department and connects to a ditch system operated by a public association established under state law to address local drainage problems. The Deatons dug a ditch on their property and, in so doing, disturbed an area the United States Army Corps of Engineers considers a wetland. There is no showing that common dirt – the pollutant at issue – left the Deatons' property, flowed into the roadside ditch, or reached any navigable in fact waters.

The questions presented are:

1. Are the roadside ditch and the wetland next to it "navigable waters" under the Clean Water Act?

2. Where activity in a wetland has not degraded either a nonnavigable roadside ditch next to the wetland or a downstream traditional navigable water, does Congress's commerce power over navigation allow federal regulation of that wetland or that roadside ditch?

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INTEREST OF AMICUS CURIAE[1]

The California Farm Bureau Federation ("CFBF") is California's largest farm organization with more than 89,000 member families in 53 county Farm Bureaus. It is a voluntary, nongovernmental, nonpartisan organization of farm and ranch families seeking solutions to the problems that affect their lives, both socially and economically. CFBF farm families contribute the majority of agricultural production in California, which saw its agricultural marketing reach $27.2 billion in 2000. Many of these families farm on lands that contain the types of seasonally wet ranch land at issue in this case.

CFBF is organized on a county, state and national basis in that order. The policies and programs of CFBF are developed from grassroots recommendations originating at the community and county Farm Bureau levels. From these recommendations, tentative policy resolutions are prepared and submitted to the CFBF House of Delegates for action at its annual meeting each December. The House of Delegates is made up of representatives elected by members of the county Farm Bureaus. Resolutions on state matters become CFBF policy.

In its present state, the Clean Water Act (hereinafter, alternatively the "CWA" or the "Act") is incomprehensibly vague. Farmers and ranchers – and indeed, federal regulators – have no reasonable or reliable means of determining the reach of the Act, simply because there are various, often inconsistent, interpretations of

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus* represents that it authored this *amicus* brief and that no entity other than *amicus*, their members, or their counsel made a monetary contribution to the preparation or submission of the brief. Counsel for *amicus* represents that counsel for all parties have consented to the filing of this *amicus* brief. Letters reflecting their consent have been filed with the Clerk.

fundamental CWA terminology. For example, this Court itself eliminated CWA jurisdiction over "isolated waterbodies" in 2001,[2] and yet, similar isolated bodies of water are often considered "jurisdictional" under the CWA in some federal circuits.[3] As a result, CWA jurisdiction has become "circuit dependent." Because no two circuits apply the same interpretation, neither citizen nor regulator is capable of articulating the types of land or water features that are jurisdictional under the CWA.

CFBF believes it is imperative that the ambiguity and uncertainty inherent in the current interpretations of CWA jurisdiction be addressed by this Court at this time. This uncertainty is undermining agricultural production, not only in California, but nationwide. The relevance and importance of this controversy is illustrated by the fact that no less than three petitions arising from cases in three different circuits are now pending before this Court. Newdunn v. United States; No. 03-637; Rapanos v. United States, No. 03-929

CFBF has received the parties' written consent to file this brief as *amicus curiae* in support of Petitioners. Letters of consent have been filed with the Clerk of the Court.

SUMMARY OF ARGUMENT

Section 310(a) of the CWA prohibits the "discharge" of "pollutants" into "navigable waters" unless authorized by a permit or statutory exception. 33 U.S.C §1311(a). The term "pollutant" is defined to include, among other things, "rock," "sand," and "dredged soil." Id. § 1362(6). A "discharge" is "any addition" of a pollutant to

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[2] Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers ("SWANCC"), 531 U.S. 159 (2001).

[3] See, among others, Borden Ranch P'ship v. Army Corps of Eng'rs, 261 F.3d 810 (9th Cir. 2001).

"navigable waters" from any "point source." Id. § 1362(12). "Navigable waters" are defined by the CWA as encompassing "waters *of* the United States." 33 U.S.C. § 1362(7). (emphasis added).

The legislative history of the CWA provides ample guidance in determining the legislative intent of the Act. As is discussed in greater detail below, the Act was adopted to prevent and prohibit the *measurable degradation* of the nation's *navigable* waterways. This intent is supported by the plain language of the Act itself, which specifically defines navigable waters as waters "of" the United States. However, in attempting to extend the reach of the CWA, certain regulatory and judicial interpretations have eliminated common sense interpretation of CWA terminology, creating ambiguity, if not chaos, in the regulatory scheme. They have effectively amended the statute to cover not just waters "of" the United States, but arguably all waters *in* the United States. For example, the term "navigable water" is characterized randomly depending upon the federal circuit.[4] Likewise, the CWA's

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[4] Compare, for example, D.E. Rice v. Harken Exploration Co. (5th Cir. Tex.) 2001 WL 422051 (holding that "intermittent streams" and/or "seasonal creeks" do not fall under the purview of the Oil Pollution Act -- and, by implication, the CWA -- because they are neither "navigable" nor "sufficiently linked to an open body of navigable water") and United States of America v. Needham, et al., (5th Cir.) Dec. 16, 2003: Case No. 02-30217 (holding that CWA jurisdiction exists only over waters which are themselves either navigable-in-fact or immediately adjacent to "open" water) to U.S. v. Buday, 138 F.Supp.2d 1282 (Mont. 2001) (holding that ***any*** connection to navigable-in-fact water is sufficient to constitue "tributory" status for CWA purposes), and, more recently, to United States of America v. Adam Bros. Farming, Inc., et.al (U.S. Dist. Ct, Central Dist. CA) Dec. 8, 2003: Case No. CV 00-07409 CAS (on appeal to the 9th Circuit) (holding that CWA jurisdiction applies to ephemeral streams and property adjacent thereto despite fact that water from said stream had to traverse up hill to reach any navigable water body and that water from said stream was only

threshold requirement of an "addition" of a "pollutant," at least in some circuits, has been held to be virtually meaningless.[5] Indeed, these ambiguities have led to the instant petition for certiorari with regard to the Fourth Circuit's ruling on the "roadside ditch" and "adjacent" wetlands found on the Deaton property.

There is little to no difference between the physical features of the manmade "roadside ditch" on the Deaton property and farm furrows and associated ditches that must necessarily be excavated on millions of acres of private property in this Nation for agricultural production to take place. Indeed, the manmade ditch on the Deaton property is smaller in stature and carrying capacity than the majority of the agricultural ditches currently created and maintained for the production of fruit, vegetables, and fiber in virtually every state. As with the roadside ditch on the Deaton property, virtually every one of these agricultural ditches carries excess water that "flows" downhill, into some other conveyance ditch and sometimes, ultimately, to some navigable-in-fact water. Just as gutters carry excess water way from roofs and homes, the primary function of agricultural ditches and furrows is to carry excess water away from the crop itself.

The implication of CWA regulation over these millions of acres of agricultural furrows and ditches cannot be overstated. All water flows downhill. The Fourth

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alleged to reach a navigable body of water approximately 12 days per year).

[5] For example, the Ninth Circuit has held that an "addition" of a "pollutant may occur as a result of *any* movement of soil (even a fraction of an inch), reasoning that said soil somehow changes molecular structure when disturbed, thus constituting an "addition" of a new element from the same soil (the "pollutant"). See Borden Ranch Partnership v. United States Army Corps of Engineers, 261 F.3d 810 (9th Cir. 2001). This interpretation effectively nullifies the CWA's own threshold requirements.

Circuit ruling arguably extends federal jurisdiction to any land on which there is water that may flow downhill. Federal approval under the CWA for all work required to be undertaken by farmers seeking to create new row crops and associated ditches on property similar to that adjacent to the roadside ditch in the Deaton case is impeding agricultural production in this country.[6] This impediment is improper. First, the Clean Water Act itself was not intended to cover land features such as furrows and roadside ditches. Second, qualified and efficient local governmental bodies traditionally entrusted with responsibility over furrows and roadside ditches are being displaced by federal CWA intrusion, thus seriously affected the balance of federal/state relations. Finally, clear standards must be established which provide guidance for the legitimate factual finding of an "addition" of a "pollutant;" no citizen should be required to seek regulatory approval under a water quality statute when their actions will have no effect or a de minimus effect on water quality.

CFBF therefore respectfully requests that this Court grant the instant petition for certiorari and provide both citizens and regulators with some semblance of clarity – some measurable standard – by which to gauge the reach of the CWA.

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[6] See, e.g., United States of America v. Adam Bros. Farming, Inc., et.al , at footnote 4, supra, and Borden Ranch Partnership v. United States Army Corps of Engineers, at footnote 5, supra.

ARGUMENT

I. ADHERENCE TO THE FOURTH CIRCUIT'S "EVENTUALLY FLOWS" THEORY WOULD SIGNIFICANTLY IMPACT AND DISRUPT ROUTINE AGRICULTURAL PRODUCTION

A. Construction And Maintenance of Ditches and Furrows are Necessary for Agricultural Production

Webster's Dictionary defines the term "furrow" as "1. a trench in the earth made by or as by a plow. 2. any narrow channel, or groove. 3. plowed land; field."[7] Prior to agricultural planting, furrows are created between rows of a multitude of crop varieties, including lettuce, celery, broccoli, cauliflower, strawberries, and cotton. In California alone, there are more than 7.5 million acres of irrigated fields at any given time during a calendar year.[8] Furrow irrigation (also known as "flood irrigation") serves two primary purposes with regard to agricultural production: (1) it provides an efficient and economical system of irrigation, and (2) it provides a means of diverting excess water away from the producing field when it rains too much.

It is this latter purpose that creates the necessity of building some mechanism to accommodate excess water from agricultural fields. For this reason, agricultural furrows are constructed on a slight slope, a design that

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[7] Webster's New International Dictionary (William A. Neilson ed., 2nd ed. 2000).

[8] USDA - *National Agricultural Statistics Service* 1992 *Census of Agriculture*, Volume 1: Part 05, Chapter 1: CALIFORNIA

allows excess water to be discharged into larger centralized ditches located on the perimeter of the furrowed fields. Like all free water, the excess water in these ditches runs downhill. Depending on the circumstances, some of this water may well flow into a navigable in fact water body, such as a river or an ocean, many miles away. In Western States, many of these water bodies are ephemeral in nature, running to a navigable water only during the largest storm events.

Such furrows and ditches are as necessary to agricultural life as storm drains and gutters are to life in the city. No one would suggest that the water in the gutter converts the gutter into a water of the United States for purposes of CWA jurisdiction.

B. The Clean Water Act Was Never Intended to Support Federal Jurisdiction Over Agricultural Ditches/Furrows And Wetlands Adjacent To Said Ditches/Furrows

Congress passed the CWA in 1972 in reaction to incidences involving heavily polluted navigable waters, such as the burning of the Cuyahoga River cited in SWANCC.[9] The authority granted to the Corps by Congress has not been expanded since the Corps promulgated its own regulations of the CWA in 1974.

As originally interpreted by the Corps and intended by Congress, the term "navigable waters" meant the following: "those waters *of* the United States which are subject to the ebb and flow of the tide and/or are presently, or have been in the past, or may be in the future susceptible for use for purposes of interstate or foreign commerce." 33

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[9] 531 U.S. at 175 (Stevens, J. dissenting).

C.F.R. §209.120(d)(1) (1974) (emphasis added). The "General Policies" subheading of the 1974 regulations specifically provided that, "[t]he term 'navigable waters of the United States' is used to define the scope and extent of the regulatory powers of the Federal government." 33 C.F.R. §209.260(b)(1974). This Court most recently interpreted these regulations in SWANCC.[10] In that case, this Court reaffirmed the fact that the Corps' own regulations "emphasized that '[i]t is the water body's capability of use by the public for purposes of transportation or commerce which is the determinative factor [in deciding jurisdiction].' 33 C.F.R. §209.260(e)(1)." SWANCC, 531 U.S. at 168. Perhaps more importantly, the Court also noted that there was nothing in the legislative history to signify that "Congress intended to exert anything more than its commerce power over navigation." Id. at 168 n.3.

Although not binding, Justice Stevens' dissent in SWANCC provides some guidance as to the limits imposed on the CWA by the majority opinion: "The term 'navigable' has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be made so." SWANCC, 531 U.S. at 172 (Stevens, J. dissenting). In the dissent, Justice Stevens carefully explained his understanding that the majority opinion effectively excluded from CWA jurisdiction (a) tributaries and wetlands that are not contiguous or adjacent to navigable waters, and (b) "other waters" such as "intermittent rivers, streams, tributaries, and perched wetlands that are not contiguous or adjacent to navigable waters." Id. at 188 fn. 14 (internal quotes omitted).

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[10] 531 U.S. 159 (2001).

Ultimately, the holding in SWANCC is consistent with both the plain language of the CWA and its legislative history. The only Corps actions limited by the SWANCC opinion are those which were never approved or intended by Congress in the first place.

Nevertheless, despite the clear intent of both legislative history and the Corps' own regulations, and despite the clear mandate set forth in SWANCC, the Corps continues to press an overreaching interpretation of the CWA, asserting jurisdiction over "roadside" and "agricultural" ditches which have little or no connection with navigable bodies of water and which have traditionally and effectively been managed by local entities.

Indeed, as is evidenced by numerous cases, both the Corps and some lower courts have ignored the CWA and this Court's holding in SWANCC (see Buday and Adam Bros., fn. 4, supra; see also Borden Ranch, fn. 5, supra). Equally as disturbing is the fact that most CWA "enforcement actions" based upon these overreaching interpretations never reach the judicial system. The vast majority of enforcement actions are undertaken through "administrative orders" against family owned, land dependent businesses (e.g. agricultural and ranching operations) that are financially incapable of mounting a jurisdictional defense despite the weight of authority in their favor. These actions have produced a chilling effect on such landowners. As it is currently implemented by the Corps, the CWA prohibits private property owners from undertaking the following acts without first securing federal acquiescence; (a) tilling dry land, (b) clearing flood channels choked with overgrown vegetation, and (c) changing the use of a given parcel from cattle grazing to cropland. In fact, depending upon which regulator is interpreting the CWA, alteration of different agricultural

commodities within a single field may be subject to Corps approval.[11]

Of course, as is abundantly evident by the above history and case law, Congress did not intend to regulate all water in the United States, and therefore federalize regulation of traditionally local land use matters and agricultural activities when it adopted the CWA. It did not envision when it enacted the CWA and its alleged "farmer exemptions" (§404(f)(1)) that a farmer or rancher desiring to plow his field to plant higher value crops – a normal activity engaged in since colonial times—would require a federal permit to dig an irrigation ditch in the middle of a field to handle excess water

The Fourth' Circuit's ruling affirming the reach of CWA jurisdiction to the Deaton's "roadside ditch" gives credence to the above described impermissible – and likely unconstitutional – interpretation of the Act. It is and will continue to have the effect of preventing otherwise legal ranching and farming activities on both improved and unimproved properties. Unless and until these illegitimate

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[11] As the 9th Circuit recently noted, "Any discharge of dredged or fill material into the navigable waters incidental to ***any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject***, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced, shall be required to have a permit under this section. 33 U.S.C. §1344(f)(2)... Although the Corps cannot regulate a farmer who desires merely to change from one ***wetland crop*** to another, ***activities that require substantial hydrological alterations require a permit***" (emphasis added, internal quotes omitted) Borden Ranch Partnership v. United States Army Corps of Engineers, 261 F.3d 810, 816 (9th Cir. 2001). Like so much of the CWA and its attendant regulations, the above-cited interpretation is both wholly subjective and impermissibly vague. More importantly, it supports the unauthorized and unsupported notion that agricultural producers are required to seek Corps permission before altering traditional dryland corps (e.g. beans and cotton) to more water intensive crops (i.e. rice and strawberries).

interpretations are checked, agricultural production – and indeed, economic production of all kinds – will continue to be unnecessarily weakened.

C. The Imposition of Federal Clean Water Act Jurisdiction Over Agricultural Ditches and Furrows Would Undermine Local Management Practices

The Corps has long maintained that drainage ditches constructed on dry land, are ***not*** waters of the United States for CWA purposes. In the regulatory preamble to a revision of its Nationwide Permit ("NWP") regulations in 2000, the Corps responded to criticism that it had illegally asserted jurisdiction over drainage ditches as follows:

> "A drainage ditch constructed in a stream, wetland, or other water of the United States remains a water of the United States, provided an OHMW [ordinary high water mark] is still present. Since drainage ditches constructed in waters of the United States are constructed either by channelizing a stream or excavating the substrate to improve drainage, it is unlikely that the drainage ditches will become dry land unless the hydrology is removed. District engineers will determine, on a case-by case basis, whether a particular area is a water of the United States. If the construction of a drainage ditch has legally converted the area to dry land, then the area drained is not a water of the United States, however, in most cases the drainage ditches would remain a water of the United States.
>
> The statement that non-tidal drainage ditches are waters of the United States if they extend the

> OHWM of an existing water of the United States is consistent with the final rule published in the November 13, 1986 Federal Register and applies to ditches constructed in waters or that connect waters. ***Nothing in the NWP notice was intended to change the November 13, 1986 Federal Register notice which states that drainage ditches constructed entirely in upland areas generally are not considered to be waters of the United States.***
>
> Drainage ditches constructed in uplands that connect two waters of the United States may be considered waters of the United States if those ditches constitute a surface water connection between those two waters of the United States. As previously noted, drainage ditches constructed entirely in uplands generally are not considered to be waters of the United States. District Engineers will use the criteria at 33 CFR 328.3(e) to determine the presence and extent of an OHMW that may have developed in a drainage ditch. "[12]

If CWA jurisdiction were applied to agricultural ditches and furrows as the Forth Circuit has suggested it should, the result would be an inability for the vast majority of the nation's farmers to produce crops in a viable and reasonable manner. As discussed above, in California alone, there are more than 7.5 million acres of irrigated fields at any given time during a calendar year. California's 88,000 farms cover about one-third of the state's total land area. California ranks fifth nationally in farm numbers, but farms in the State produce more than half of the nation's fruits, vegetables and nuts from just 3 percent of the nation's farmland. One California farmer supplies enough

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[12] 65 Fed. Reg. 12818, 12823-12824 (March 9, 2000) (emphasis added)

food, fiber and flowers for 135 people.[13] Were each furrow and ditch on these fields subject to regulation under the CWA, farming as we now know it would cease to function. Every time a farmer wished to plow a field (a decision which is often market driven, and therefore, extremely time dependant), he or she would be required to seek a Section 404 permit based upon either (a) the existence of an OHWM within each furrow, and/or (b) the possibility, however remote, that excess water flowing downhill after being used to irrigate a field could wind up in a navigable in fact water body. This scenario – a scenario supported by the Fourth Circuit's decision in Deaton – is untenable. Farmers are left with a Hobson's Choice[14]: either they submit to the cumbersome and subjective regulatory process at the expense of production value or they face civil or criminal enforcement proceedings for historically autonomous activities which have always been permissible, if not encouraged. Given the Fourth Circuit's interpretation of the CWA, farmers would be faced with constant permitting requirements or they would face potential civil and criminal enforcement proceedings.

As agricultural producers are all too keenly aware, the CWA is not the only statute that regulates water in the United States. For example, California, like all other states, has a number of public entities that currently regulate agriculture and natural resources such as water.[15] There are

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[13] California Farm Bureau website- *Facts and Stats about California Agriculture 2002* as complied by the California Farm Bureau Federation's Communications/News Division. See http://www.cfbf.com/info/agfacts.aspx

[14] The origin of the term *Hobson's choice* is said to be in the name of one Thomas Hobson (ca. 1544-1631), at Cambridge, England, who kept a livery stable and required every customer to take either the horse nearest the stable door or none at all.

[15] Public entities in California that currently implement water quality and quantity issue enforcement include, but are not limited to; the state

literally hundreds of state and local laws that regulate all aspects of land management, from all different perspectives. In addition, California has a number of laws that were enacted specifically to protect the environment, some of which were modeled on the Clean Water Act.[16] Local autonomy over such issues was the intent of Congress when it enacted the CWA. Congress explicitly provided that states develop local land use requirements and other mechanisms to control non-point sources of potential pollution.[17] As pointed out in the Deaton's petition, the purpose of these requirements was that

> [C]itizens must have some means of knowing which of the two governments to hold accountable for the failure to perform a given function. 'Federalism serves to assign political responsibility, not to obscure it.'[18]

Irrespective of the many local and state regulations, given the split of the circuits and the varying interpretations of the CWA and its terms by regulators, a landowner may conduct certain activities in one district but be prosecuted under the CWA for the same activities in another.[19] The

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water resource control board, local flood control boards, local water management boards, local agricultural commissions, the coastal commission, and local planning departments.

[16] See e.g. California Public Resources Code § 2100 et seq. (CEQA) and California Water Code §1300 et seq.

[17] See, e.g., 33 U.S.C. § 1288(b)(2)(F); § 1313(f); § 1314(f); and § 1329 governing storm water runoff.

[18] See Deaton Petition at 22, United States v. Lopez, 514 U.S. 549 at 576 (Kennedy, J., concurring) (1995).

[19] See e.g. *Final Summary Report: Guidelines For Jurisdictional Determinations For Waters Of The United States In The Arid Southwest*, prepared by the Army Corps of Engineers South Pacific Division June 2001, §2.2 Definition of Waters of the United States ("Although the above water bodies are typically not considered waters of the United States, the Corps of Engineers reserves the right, on a case-by-case basis, to determine that a particular water body within the

disparate treatment is not based on state or local regulations, but on the different interpretations of the CWA in various districts and courts, as well as in the minds of the various regulators charged with enforcement of the Act's provisions. As illustrated above (see fn.4, supra) the Fourth, Fifth and Ninth Circuits have taken widely divergent views over what constitutes a regulatable water after SWANCC.[20] This divergence in opinion poses a serious threat to America's farming communities across the country, given the uncertainty it creates and the effective usurping of state or local authority.

SWANCC should have been a limiting force to the federal government's past practice of utilizing the CWA to assert jurisdiction over any and all types of land (whether wet or dry) by bootstrapping said land into a manufactured and congressionally unsupported definition of "waters of the United States." However, given the inability of regulators and the courts to agree on the effect of SWANCC on the definition of "waters of the United States," further clarification is necessary.

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above categories represents a jurisdictional water of the United States."); 51 Fed. Reg. 41,206, 41,217 (Nov. 13, 1986) (Corps "generally" does not consider ditches excavated on dry land to be waters of the United States, but may claim otherwise "case-by-case").

[20] While the Ninth Circuit has taken a seemingly narrow interpretation of SWANCC in CWA cases directly (Headwaters, Inc. v. Talent Irrigation District, 243 F.3d 526 (9th Cir. 2001)), it affirmed the importance of SWANCC in Katie John et. al. v. United States, 247 F.3d 1032 (2001). Although Katie John is admittedly distinguishable from the instant case in that it involved different facts and the interpretation of a different statute, Katie John is nevertheless notable for the Ninth Circuit's deferential treatment of the SWANCC decision, both by the majority opinion and the dissent.

CONCLUSION

Amicus respectfully urge this Court to grant the petition.

Respectfully submitted,

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No. 03-701

In The

Supreme Court Of The United States

JAMES S. AND REBECCA DEATON,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF AMICUS CURIAE OF THE HONORABLE JOHN J. DUNCAN, JR. IN SUPPORT OF THE PETITIONERS

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STATEMENT OF INTEREST

With the written consent of the parties, reflected in letters on file with the Clerk, this brief is submitted on behalf of the Honorable John J. Duncan, Jr., as amicus curiae, pursuant to Rule 37 of the Rules of this Court. The Honorable John J. Duncan, Jr. is the Chairman of the Water Resources and Environment Subcommittee of the House Committee on Transportation and Infrastructure, which has jurisdiction over the Clean Water Act and responsibility for oversight over the implementation of that Act. In that role, Congressman Duncan has a substantial interest in the administration of the Clean Water Act and in ensuring that the Act is administered in a way that is consistent with the intent of Congress and fair to landowners and others who are regulated under the Act. [1]

SUMMARY OF ARGUMENT

To uphold the assertion by the U.S. Army Corps of Engineers ("Corps") of jurisdiction under the Clean Water Act, 33 U.S.C. §§ 1251-1387, over land at issue in *United States* v. *Deaton*, 332 F.3d 698 (4th Cir. 2003) ("*Deaton*"), the U.S. Court of Appeals for the Fourth Circuit has interpreted the Act to provide broad authority to the Corps to determine the scope of its jurisdiction with only the goals of the Act to guide the Corps' decision-making. Under this authority inferred by the Fourth Circuit, the Corps may, on a case-by-case basis, and without notice and comment, effect a significant expansion of the jurisdiction of the United States under the Clean Water Act. This decision has contributed to

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[1] No counsel for a party authored this brief in whole or in part and no person or entity, other than the *amicus curiae* or his counsel, made any monetary contribution to the preparation or submission of this brief.

widespread confusion over the extent of federal regulation and is in clear conflict with the ruling of the U.S. Court of Appeals for the Fifth Circuit in *Needham v. United States*, ____ F.3d ____, 2003 WL 22953383 (5th Cir. 2003) ("*Needham*").

According to the Fourth Circuit, the jurisdiction of the Clean Water Act extends to "any branch of a tributary system that eventually flows into a navigable body of water," *Deaton*, 332 F.3d at 711. Federal regulations provide no definition of the term "tributary." The court below held that, "the word 'tributaries' in the regulation [of the Corps] *means what the Corps says it means.*" *Id.* (emphasis added). The Corps' exercise of this discretion must only seek to advance the broad goals of the Act[2] and, to receive deference from a reviewing court, the Corps' interpretation of what constitutes a "tributary" need only be consistent with the dictionary definition of that word.[3]

This reasoning gives the Corps virtually unfettered discretion to determine that a parcel of land is adjacent to a tributary of a water of the United States, and therefore is itself subject to federal jurisdiction as a water of the United States. At present, landowners cannot know what activities they may lawfully undertake on their property without consulting with the Corps, and are at the mercy of arbitrary decisions by regulatory officials.

In short, the Corps' regulations defining the scope of its jurisdiction under the Clean Water Act are ambiguous, and the Fourth Circuit has given the Corps essentially free reign to interpret its jurisdiction in an expansive manner,

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[2] *Deaton*, 332 F.3d at 707 (quoting the goals of the Act), 712 (noting the breadth of Congressional concern over water quality).

[3] *Id.* at 710-11.

resulting in confusion and uncertainty among the regulated community. The Corps has now abandoned any effort to address this confusion and uncertainty on its own, leaving it to the courts to provide clarity. However, the lower courts are clearly divided on the scope of the Corps' jurisdiction. As a result, this Court now truly represents the court of last resort to bring much-needed clarity to the Clean Water Act jurisdictional muddle.

ARGUMENT

I. THE DECISION BELOW IMPROPERLY INTERPRETED THE STRUCTURE AND OPERATION OF THE CLEAN WATER ACT

As this Court held in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Eng'rs,* 531 U.S. 159 (2001) ("*SWANNC*"), in enacting the Clean Water Act in 1972, Congress had in mind the protection of traditional navigable waters. However, the Fourth Circuit has ignored the clear guideposts set out by this Court in *SWANNC* and as a result has misinterpreted the jurisdictional scope of the Clean Water Act. In doing so, the Fourth Circuit has given the Corps great discretion in interpreting its jurisdictional reach in particular cases.

The Clean Water Act prohibits the discharge of any pollutant by any person without a permit under the Act. 33 U.S.C. § 1311(a). The Act defines "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source." *Id.* § 1362(12). The Deatons in this case were alleged to have discharged a particular type of pollutant – dredged or fill material – into navigable waters without a permit under Section 404 of the Act, 33 U.S.C. § 1344, which authorizes the Corps to issue permits for such

discharges to navigable waters. The Act defines "navigable waters" as "the waters of the United States, including the territorial seas." *Id.* § 1362(7).

The Corps has sought to further define the jurisdictional scope of the Clean Water Act for the purposes of implementing section 404 by promulgating a definition of "waters of the United States." 33 C.F.R. § 328.3(a).[4] Under this regulation, "waters of the United States" covers a wide range of water bodies and wetlands, including waters that are currently used, used in the past, or susceptible to use in interstate or foreign commerce, including all waters subject to the ebb and flow of the tide (*i.e.*, traditional navigable waters) (*id.* § 328.3(a)(1)); interstate waters including interstate wetlands (*id.* § 328.3(a)(2)); all other waters the use, degradation or destruction of which would affect interstate or foreign commerce (*id.* § 328.3(a)(3)); all impoundments of waters otherwise defined as waters of the United States (*id.* § 328.3(a)(4)); tributaries of waters identified in paragraphs (1) through (4) (*id.* § 328.3(a)(5)); the territorial seas (*id.* § 328.3(a)(6)); and wetlands that are adjacent to any of the waters identified in paragraphs (1) through (6) (*id.* § 328.3(a)(7)).

In this case, the Corps asserted federal jurisdiction over the petitioners' property on the grounds that it is a wetland adjacent to a tributary of a water of the United States.[5] The Corps' regulation provides no definition of the

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[4] The regulations of the U.S. Environmental Protection Agency ("EPA") include the same definition. 40 C.F.R. § 230.3(s).

[5] *Deaton*, 332 F.3d at 712. Before January 2001, the Corps used its definition of waters of the United States to assert jurisdiction over virtually any land that exhibited the soils, vegetation and hydrology that are characteristic of wetlands. Once these characteristics were established, the Corps could simply allege an impact on interstate or

term "tributary." However, through a series of conclusory arguments, the court below affirmed the Corps' jurisdictional determination by holding that the Clean Water Act confers upon the Corps the broad authority to determine what is a "tributary" of a navigable water, as long as the assertion of federal jurisdiction serves to further the goal of attaining and maintaining the quality of the Nation's waters.

The analytical path traveled by the court below is essentially as follows: *whereas* "[t]he power over navigable waters also carries with it the authority to regulate non-navigable waters when that regulation is *necessary* to achieve Congressional goals in protecting navigable water," *Deaton*, 332 F.3d at 706 (emphasis added), and *whereas* "[a]ny pollutant or fill material that degrades water quality in

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foreign commerce under 33 C.F.R. § 328.3(a)(3) to establish federal jurisdiction. However, in January 2001, this Court called into question whether federal regulation extended to all waters the use, degradation or destruction of which would affect interstate or foreign commerce. *SWANCC*, 531 U.S. at 172-73 (requiring import to be given to the term "navigable" and noting the outer limits of Congress' power under the Commerce Clause). Following the publication of that opinion, the Corps more often has asserted jurisdiction over land that exhibits wetland characteristics on the basis that it is a tributary of a navigable water, or adjacent to a tributary of a navigable water. Indeed, following *SWANCC*, most of the lawsuits involving landowners who disagreed with the assertion of jurisdiction over their property by the Corps have involved assertions of jurisdiction based on allegations that the property is adjacent to a tributary of a navigable water. *See, e.g., Newdunn Associates, LLP v. U.S. Army Corps of Eng'rs*, 344 F.3d 407 (4th Cir. 2003), *petition for cert. filed*, 72 U.S.L.W. 3310 (Oct. 27, 2003)(No. 03-637) (assertion of jurisdiction based on allegation that land was adjacent to a tributary of a navigable water); *United States v. Rapanos*, 339 F.3d 447 (6th Cir. 2003), *petition for cert. filed*, 72 U.S.L.W. 3451 (Dec. 22, 2003) (No. 03-929) (same). Accordingly, the meaning of the term "tributary" has taken on increasing significance.

a tributary of navigable water has the potential to move downstream and degrade the quality of the navigable waters themselves," *id.*, and *whereas* the goal of the Clean Water Act is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters," 33 U.S.C. § 1251(a), *quoted in Deaton*, 332 F.3d at 706, and *whereas* Congress delegated to the Corps of Engineers and EPA "the job of getting this done," *Deaton*, 332 F.3d at 706, *therefore*:

> This use of delegated authority [by regulating nonavigable tributaries and their adjacent wetlands] is well within Congress's traditional power over navigable waters.

Id.

The import of this analysis is that a delegation of authority to the Corps (using the goals of the Act as the only intelligible principle to guide the agency's decision-making) is within Congress's power, and that the Clean Water Act is properly interpreted as a delegation from Congress to an executive branch agency to do *whatever it takes to get the job done* in restoring and maintaining the chemical, physical, and biological integrity of the Nation's waters.

That is not what the Clean Water Act says. The Clean Water Act carefully prescribes – in ninety-four separate sections – how the goals of the Act are to be implemented.[6] An implementing agency and a reviewing

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[6] *See, e.g.*, 33 U.S.C. §§ 1251-74 (research and grant programs); *id.*, §§ 1291-1301 (construction grants for publicly owned treatment works); *Id.* § 1329 (assistance for the management of unregulated nonpoint sources); *id.* § 1342 (permitting program for point source discharges, with exemptions); *id.* § 1344 (permitting program for discharges of dredged and fill material, with exemptions). The United States has recently recognized that "[t]he Clean Water Act addresses the problem of

court must use the specific terms of the Clean Water Act to determine the Act's jurisdictional scope, not the broad goals of the Act. As this Court has long recognized:

> No legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice – and it frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statute's primary objective must be the law.

Rodriguez v. United States, 480 U.S. 522, 525-26 (1987).[7]

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water pollution control through a multi-faceted federal-state approach," with different sections of the Act addressing different aspects of the problem. Brief for the United States as Amicus Curiae Supporting Petitioner, *South Florida Water Management District v. Miccosukee Tribe of Indiana,* No. 02-626 (filed Sept. 10, 2003), at 3.

[7] Section 402(p) of the Clean Water Act provides a good example of legislative choice. Section 402(p) requires municipalities to bring storm water discharges from municipal separate storm sewer systems under Clean Water Act regulation over time and to regulate those discharges "to the maximum extent practicable." 33 U.S.C. § 1342(p). Allowing municipalities time to come into compliance and establishing a separate, "maximum extent practicable" standard for these discharges from the ditches and storm sewers in our cities and suburbs that convey drainage and runoff to navigable waters demonstrates the choice made by Congress to subject discharges from these types of conveyances to less regulation than discharges from industrial sources. However, this legislative intent could be completely upset by the decision of the lower court. Under the rationale of the decision below, municipal separate storm sewer systems could themselves be considered waters of the United States, prohibiting unpermitted discharges into those sewers and

As this Court noted in *SWANCC*, Congress provided an intelligible principle to guide the Corps' determination of the meaning of the term "waters of the United States."[8] However, that principle is not the goals of the Act. Rather, it is "what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made." *SWANCC,* 531 U.S. at 172. This does not mean that only traditional navigable waters are jurisdictional. However, it does mean that the Corps and reviewing courts must consider how all sections of the Clean Water Act work together to protect navigable waters and that, given statutory[9] and constitutional[10] constraints, the Corps – and the courts –

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requiring the water in the sewer itself to meet water quality standards, resulting in far more extensive regulation than that contemplated by section 402(p) of the Clean Water Act. *Cf. United States v. Eidson,* 108 F.3d 1336 (11th Cir. 1997) (holding that a drainage ditch that was part of a storm drainage system was a tributary of a navigable water even though it was man-made).

[8] Amicus does not contend that the Clean Water Act violates the nondelegation doctrine. *Cf. Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935) (finding no intelligible principle to guide agency-decision making, in violation of art. I, § 1 of the United States Constitution); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) (same).

[9] *See SWANCC*, 531 U.S. at 166-67 (noting that in the Clean Water Act, "Congress chose to 'recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter.'").

[10] *See SWANCC*, 531 U.S. at 174 (noting that the exercise of federal jurisdiction over land and water can raise "significant constitutional questions").

may not expand federal jurisdiction over land and water resources beyond that which is necessary to protect traditional navigable waters.

By relying solely on the goals of the Act as the principle to guide agency decision-making, the decision below ignores the specific authorities established by Congress in the Clean Water Act that protect navigable waters. The Fourth Circuit appears to believe that the only regulatory tool available to protect the quality of the Nation's waters is a finding that a ditch or other conveyance, through which pollutants may be transported to navigable waters, is itself a "water of the United States." Most significantly, the Fourth Circuit has ignored the role that section 402 of the Act, 33 U.S.C. § 1342, plays in protecting navigable waters from pollution.

Section 402 of the Act authorizes and regulates permits for the discharge of pollutants from point sources. The Act defines "point source" as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." 33 U.S.C. § 1362(14). The point source itself is not a "water of the United States." It is the discharge from the point source *into* waters of the United States that is regulated. This regulatory structure imposes federal authority at the proper place to protect the federal interest in navigable waters without infringing upon the use of private property and other land and water uses traditionally regulated by States, *i.e.,* the point of discharge into navigable waters.

Consistent with this structure, a ditch constructed in upland areas is not a water of the United States. *E.g. See* 33

C.F.R. § 323.4(a)(1)(iii)(C)(1)(i). However, under the Clean Water Act, a discharge of a pollutant *from* a ditch *into* navigable waters may be regulated and may require a Clean Water Act permit. For example, in *Needham,* the Fifth Circuit found that a regulated discharge had occurred without determining that non-navigable ditches and channels were waters of the United States. 2003 WL 22953383 (5th Cir. 2003). In that case, which was brought under the Oil Pollution Act ("OPA"), 33 U.S.C. §§ 2701-20, oil spilled into a non-navigable drainage ditch that was not adjacent to a navigable water. The court indicated that this discharge would not be regulated under OPA or the Clean Water Act. 2003 WL 22953383 at *3. However, when the oil moved from the ditch and discharged into Bayou Folse (a primary tributary of a navigable-in-fact water), the release of oil became regulated under the OPA. *Id.* at *4.[11]

Under the Clean Water Act, it is not necessary to find that ditches, sewers, or other conveyances are themselves waters of the United States to protect navigable waters from discharges of pollutants from those conveyances. Sections 301 and 402 of the Act regulate these discharges. Moreover, the Clean Water Act is not a grant of plenary authority to the Corps "to get the job done." Without the ability to rely on these assumptions, the logic of the decision below falls apart and its finding that the Corps may regulate virtually any area of land or water as a "tributary" of a navigable water, as long as that regulation advances the goals of the Clean Water Act, is clear error.

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[11] *See* 33 U.S.C. § 2702 (imposing liability on persons responsible for the discharge of oil from a facility into navigable waters).

II. THE DECISION BELOW WOULD GRANT CORPS OFFICIALS THE AUTHORITY TO GREATLY EXPAND FEDERAL REGULATION OF LAND

After concluding its constitutional and statutory analysis, the court below held that the Corps' determination of what constitutes a "tributary" is entitled to deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). To determine whether the Corps committed error, the lower court did not consider any section of the Clean Water Act other than the goals of the Act. Instead, the lower court simply referred to the dictionary definition of the term "tributary."[12]

By referencing the dictionary definition, rather than the terms of the Clean Water Act, the court below has invited individual Corps officials to regulate anything that is "providing with or serving as a channel for supplies or additional matter" to a navigable water. *See Deaton*, 332 F.3d at 710 (*quoting Webster's Third New International Dictionary* (1993)). As the Fourth Circuit noted, "[a]ccording to this definition, 'tributary' in the regulation would encompass the entire feeder system for a navigable water because even a stream many branches away eventually provides 'additional matter' for the navigable water." *Id.* Unfortunately, this definition is not limited to streams and also would encompass all things through which or over which water flows, including sewer pipes, roads, driveways,

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[12] "Because the Corps's longstanding interpretation of the word 'tributary' has support in the dictionary and elsewhere, it is not plainly erroneous." *Deaton*, 332 F.3d at 711.

and even the ground, as well as the ditches at issue in *Deaton*.

Ironically, relying on this opinion, the Corps might well be able to assert jurisdiction over the isolated ponds at issue in *SWANCC*, because it is likely that some connection could be found between those ponds and navigable waters.[13] In fact, by providing a justification for the regulation of groundwater and land on which water falls and seeps into the ground, the decision below would support an expansion of federal jurisdiction over land that does not even exhibit wetlands characteristics, as long as any hydrologic connection to navigable waters (no matter how attenuated) could be found.

This concern is not speculative. In *Rice v. Harken Exploration Co.*, 250 F.3d 264 (5th Cir. 2001) ("*Rice*"), the plaintiff alleged that the jurisdictional scope of the Oil Pollution Act (which applies to navigable waters and includes a definition of navigable waters that is identical to the definition in the Clean Water Act) extends to the release on dry land of oil that seeped into ground water. In *Rice*, the Fifth Circuit declined to find that the land at issue was subject to federal jurisdiction, but the reasoning of the Fourth Circuit in *Deaton* would support the opposite conclusion. *Compare Rice*, 250 F.3d at 269, 272 *with Deaton*, 332 F.3d at 710-11.

III. THE AGENCIES CHARGED WITH IMPLEMENTING THE CLEAN WATER ACT AND THE DECISION BELOW HAVE LEFT THE DETERMINATION OF THE

[13] Justice Stevens makes this point in his dissenting opinion in *SWANCC*. *See SWANCC* at 175, n.2 (Stevens, J. dissenting).

JURISDICTIONAL SCOPE OF THE ACT TO ARBITRARY AND INCONSISTENT CASE-BY-CASE DETERMINATIONS BY AGENCY OFFICIALS

Given its failure to constrain the Corps' discretion in a meaningful way, the decision below does not increase the clarity of the Corps' regulations defining the scope of its jurisdiction and will undermine any efforts to increase the level of consistency of its application. The decision gives the Corps unfettered discretion to determine that private property is adjacent to a tributary and therefore a "water of the United States." As exercised by individual agency officials, this discretion is fraught with the potential for error and abuse.

Concerns have already been raised about the arbitrary and inconsistent actions of regulatory officials implementing section 404 of the Clean Water Act. In October 2001, the Subcommittee on Water Resources and Environment of the Committee on Transportation and Infrastructure held a hearing on the enforcement of section 404 by the Corps and EPA. Testimony at the hearing included allegations of arbitrary decision-making, intimidation, harassment, and abuse of discretion by agency officials charged with making the decisions regarding whether or not a piece of property is a "water of the United States."[14] In September 2002, the Subcommittee on Natural Resources and Regulatory Affairs

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[14] *The Wetland Permitting Process: Is It Working Fairly?:* Hearing Before the Subcommittee On Water Resources And Environment Of The House Committee On Transportation And Infrastructure, 107th Cong. 1st Sess. (2001) 43-93, 95-99 (statements of John Chaconas, John Conner, Charles Johnson, Donna Lovell, Robert Pierce, John Simpson, Doris Wilson, and Richard Adam).

of the Government Reform Committee held a hearing on agency implementation of the *SWANCC* decision. Witnesses at that hearing provided extensive testimony regarding inconsistent jurisdictional interpretations by agency officials.[15]

The Corps and EPA had originally taken steps to try to address the confusion and unfairness occasioned by inconsistent administration of the Act. Following this Court's decision in *SWANCC*, the Corps and EPA issued an advanced notice of proposed rulemaking ("ANPRM"), to initiate a rulemaking to clarify the scope of Clean Water Act jurisdiction. 68 Fed. Reg. 1991 (2003). In the ANPRM and an accompanying memorandum, the agencies noted the widely divergent interpretations of the lower courts regarding this Court's decision in *SWANNC* – including the conflicting decisions regarding jurisdiction over tributaries – and sought comment on the appropriate definition of what waters are "isolated" as well as other revisions to the Corps' jurisdictional regulations. On December 16, 2003, however, the Corps and EPA issued a press release announcing that they did not intend to proceed with this rulemaking. Senior officials from EPA held a press conference and were subsequently quoted as indicating that the agencies are content to let the courts address the jurisdictional confusion on a case-by-case basis. *See EPA, Appellate Decisions May Return Water Act Battle to High Court,* Inside EPA (Dec. 19, 2003) at 9. As a result, only the courts can provide any

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[15] *Agency Implementation Of The SWANCC Decision:* Hearing Before The Subcommittee On Energy Policy, Natural Resources And Regulatory Affairs Of The House Committee On Government Reform, 107th Cong., 2d Sess. (2002) 54-121 (statements of Virginia Albrecht, Reed Hopper, Nancie Marzulla, and Raymond Smethurst).

clarity and consistency to the Corps' regulatory definition of waters of the United States.

IV. THE DECISION BELOW IS IN DIRECT CONFLICT WITH DECISIONS OF THE FIFTH CIRCUIT COURT OF APPEALS AND HAS CREATED CONFUSION AND AMBIGUITY OVER THE SCOPE OF FEDERAL REGULATION

Unfortunately, the lower courts have not succeeded in bringing clarity and certainty to these important jurisdictional issues. For example, the U.S. Court of Appeals for the Fifth Circuit has expressly rejected the expansive interpretation of Clean Water Act jurisdiction of the court below. *See Needham,* 2003 WL 22953383. In *Needham*, as in this case, the United States urged the court to regulate all tributaries of traditional navigable waters, and to include in the definition of tributary all waters, excluding groundwater, that have any hydrological connection with "navigable water." *Id.* at *3. Unlike the Fourth Circuit, the Fifth Circuit rejected that interpretation of the Act.

> In our view, this definition is unsustainable under *SWANCC*. The CWA and OPA are not so broad as to permit the federal government to impose regulations over 'tributaries' that are neither themselves navigable nor truly adjacent to navigable waters. *See Rice*, 250 F.3d at 269. Consequently, in this circuit the United States may not simply impose regulations over puddles, sewers, roadside ditches and the like; under *SWANCC* "a body of water is subject to regulation . . . if the

> body of water is actually navigable or adjacent to an open body of navigable water." *Rice*, 250 F.3d at 269.

Id.

With inconsistent interpretations of the Clean Water Act by different Circuit Courts of Appeals, landowners throughout the United States do not know what activities they may lawfully undertake on their property, Corps officials are left to make arbitrary and inconsistent determinations, and a landowner's only recourse is to the courts and, ultimately, to this Court.

The current state of the law regarding federal jurisdiction under the Clean Water Act is untenable not only for the regulated community, but also for regulators and reviewing courts. The degree of discretion granted by the decision below to individual Corps officials increases the complexity of a program that already is highly controversial and makes the job of the regulators even more difficult to carry out. The decision below will lead to more, not fewer, inconsistent decisions and more, not fewer, legal challenges that will further burden the judicial system. To avoid this outcome and provide clarity to the scope of federal jurisdiction under the Clean Water Act, this Court should grant certiorari.

CONCLUSION

Arbitrary and inconsistent decision-making is not acceptable under the American rule of law. Just as Congress may not delegate standardless authority to executive branch officials to regulate private property, federal agencies and courts may not interpret grants of authority from Congress in ways that lead to essentially standardless implementation of statutes. Federal jurisdiction over private property is not

whatever a Corps official says it is. Yet that is how the decision below interprets the Clean Water Act. This Court should grant certiorari to overturn that interpretation and articulate a clear standard for imposing federal jurisdiction that is consistent with the language and structure of the Act.

DATED: January 30, 2004

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No. 03-701

In the Supreme Court of the United States

JAMES S. DEATON, ET AL.
PETITIONERS,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF *AMICI CURIAE* OF THE BUILDING INDUSTRY LEGAL DEFENSE FOUNDATION, THE CALIFORNIA BUILDING INDUSTRY ASSOCIATION, AND THE CITIES OF SIGNAL HILL, DOWNEY, IRWINDALE, MONTEBELLO, POMONA, SANTA FE SPRINGS AND VERNON IN SUPPORT OF PETITIONERS JAMES S. DEATON, ET AL.

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QUESTION PRESENTED

Whether a roadside ditch fronting a privately owned piece of property is a "waters of the United States," such that the landowner violated the federal Clean Water Act by not obtaining a permit from the U.S. Army Corps of Engineers before placing dirt in a wetland adjacent to the ditch.

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INTEREST OF THE *AMICI CURIAE*

Amici Curiae the California cities of Downey, Irwindale, Montebello, Pomona, Santa Fe Springs, Signal Hills, and Vernon, the Building Industry Legal Defense Foundation ("BILD") and the California Building Industry Association ("CBIA") advocate in rulemaking, policy-making and law-making venues to ensure that the federal Clean Water Act ("CWA") is interpreted and applied in a manner that respects the outer bounds of authority vested by Congress in the administering agencies.[1] The *Amici Curiae* cities have a combined population of over 300,000 people. Each city is regulated under a CWA permit for urban runoff, where jurisdictional issues as to the boundary between the storm drain and waters of the United States are of paramount importance. The membership of BILD and CBIA includes almost all the major homebuilders in America, companies that build homes on raw land throughout the country, in so doing frequently encountering agency interpretation of the jurisdictional reach of CWA. Most large homebuilding projects in America are subject to CWA permits for runoff to waters of the United States. The location of federal waters is of critical importance to CWA permit holders like the *Amici Curiae* and their members because their compliance obligations are in specific reference to them.

The agencies progressively have attempted to expand the reach of federal waters, to the point that "waters of the United States" can be found in some jurisdictions to include, by virtue of agency fiat, ephemeral drainages, drainage ruts,

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1 *Amici Curiae* have received the parties' written consent to file this brief in support of petitioners. Letters of consent have been filed with the Court. Counsel for *Amicus Curiae* have authored this brief, which was not written in whole or in part by counsel for a party. No one other than certain *Amici Curiae* made a monetary contribution to the preparation of this brief.

storm drain pipes, and even the curb, street and gutter. This upland extension of claimed federal jurisdiction over waters has eviscerated the distinction between the national interest, on the one hand, and the local interest, on the other, subjecting municipalities and homebuilders to federal land use planning—a result expressly rejected by Congress, and one that contravenes principles of federalism. The experience in this regard has been acute in California.

I. SPECIFIC EXAMPLES OF REGULATORY EXCESS IN CALIFORNIA.

U.S. EPA has "delegated" authority under CWA to the State of California, but retains its own authority to act here and often does. The State of California amended its Water Code in 1972 in part to "avoid direct regulation by the federal government" under CWA.[2] However, that legislative purpose has never been fully realized. As the *Amici Curiae* often hear from state water quality regulators, their "hands are tied" by U.S. EPA directives.

The following examples illustrate how water quality regulators in California improperly asserting jurisdiction under CWA, resulting in invasive regulation that is doing little to improve the water quality of truly federal waters.

A. The Automatic Extrapolation Of Beneficial Uses For Actual Open Waters To Upstream Drainages, Regardless Of Their Actual Uses.

The upland extension of waters of the United States creates bizarre results when coupled with the so-called "Tributary Rule," contained in many of the U.S. EPA-approved water quality control plans for the State of California.[3] Under the Tributary Rule, the agencies

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[2] Cal. Water Code § 13320(c), Stats. 1972, c. 1256, p. 2485, § 1, eff. Dec. 19, 1972.

[3] California is split into nine regions, each with a Regional Water Quality Control Board, and each with a U.S. EPA-approved water quality

improperly assume that storm drains and other upstream drainage features automatically have the same water quality standards as the receiving waters into which they drain. For example, the Tributary Rule in the L.A. Basin Plan states as follows:

> Those waters not specifically listed . . . are designated with the same beneficial uses as the streams, lakes, or reservoirs to which they are tributary. This is commonly referred to as the "tributary rule."[4]

The Tributary Rule is being used to regulate municipalities and homebuilders, as if they were discharging to waters that constitute a public water supply, or a public beach, or a habitat for fisheries, when the reality is to the contrary.

For example, on the basis of the Tributary Rule, Vacaville, a small city in the Central Valley of California, is being held to a CWA permit for its wastewater plant predicated on the assumption that the beneficial uses for public water supplies and cold water fisheries are relevant to the ditch to which it discharges (a hydrologically modified "receiving water" dominated by wastewater effluent and agricultural tailwater) when, in fact, the Regional Board concluded that such uses did not exist. While the wastewater plant is located many miles upstream of the Sacramento-San Joaquin River Delta, on the basis of the Tributary Rule, the agency applied the Delta's beneficial uses to the plant's discharges.[5]

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control plan, or Basin Plan, containing local water quality standards for that region.

4 Water Quality Control Plan, Los Angeles Region, at 2-4 (June 13, 1994), *available at* http://www.swrcb.ca.gov/rwqcb4/html/meetings/tmdl/Basin_plan/basin_plan_doc.html ("L.A. Basin Plan").

5 Order WQO 2002-15, Cal. State Water Res. Control Bd., at 29-30 (Oct. 3, 2002), *available at* http://www.swrcb.ca.gov/resdec/wqorders/2002/wqolog.html.

The Regional Board had tried vehemently to modify the Tributary Rule in an attempt to "remove a known falsehood from the Basin Plan."[6] As noted by the Regional Board, "[i]n the real world of the Central Valley's watersheds, exceptions to the tributary footnote [*i.e.*, rule] abound," the "fundamental premise" of which is "false."[7] When U.S. EPA disapproved of the Regional Board's attempt to modify the Tributary Rule,[8] the Regional Board explained that the Tributary Rule can lead to "inconceivable" results that "just do not make sense,"[9] commenting: "USEPA staff have invoked the tributary footnote as the appropriate principle governing the selection of beneficial uses, even in the face of conflicting facts. . . . USEPA says there is no need for fact findings, the tributary footnote tells us all we need to know."[10] Similarly, in 2001, another Regional Board (based on the Tributary Rule) applied designated beneficial uses for Newport Bay in Orange County to a vertical-walled, fenced-off concrete box culvert draining a downtown area. Thus, found the Regional Board, drinking water and swimming standards must be met in the culvert. Since the standards were not met within the culvert, the Regional Board recommended that the culvert be listed as not meeting water quality standards under CWA's Section 303(d) program.

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6 Staff Report Re: Amendment of the Water Quality Control Plan for Sacramento River Basin, Sacramento-San Joaquin Delta Basin, and the San Joaquin River Basin, Central Valley Regional Board (Oct. 11, 1994) ("Staff Report").

7 Staff Report.

8 Letter from Alexis Strauss to Edward Anton re: Disapproval of Certain Portions of Central Valley Basin Plan (May 26, 2000) (letters available upon request of the Court).

9 Letter from Jerrold Burns to Kathy Goforth re: Response to US EPA Actions on Central Valley Basin Plan Amendments (Aug. 31, 2000).

10 *See* Staff Report.

Amici Curiae supported a study by Drs. Susan Paulsen and John List of water quality concerns in the Los Angeles region, including the Tributary Rule. Drs. Paulsen and List, nationally recognized water quality experts, concluded in part:

> The application of water quality objectives to all tributary streams via the tributary rule . . . could require the collection and treatment of storm flows, urban runoff, and other nonpoint source sources on a very small, localized scale. This would result in impractical, costly and inefficient methods for improving water quality in the larger receiving water bodies that the Clean Water Act . . . primarily intended to protect. The tributary rule should be revised to reasonably protect designated beneficial uses without extending, at enormous potential expense, regulatory requirements to each and every upstream drainage facility. . . . [11]

B. Vertical-Walled Box Culvert Being Regulated As Waters Of The United States That Are Swimmable.

A vertical-walled, concrete-lined box culvert that runs from downtown Los Angeles to Culver City, approximately three miles, is designated a "waters of the United States" by the L.A. Regional Board. The culvert was assigned a body-contact recreational use called "REC-1" which includes swimming; REC-1 is defined as follows:

> Uses of water for recreational activities involving body contact with water, where ingestion of water is reasonably possible. These uses include, but are not

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[11] Susan C. Paulsen & E. John List, *A Review of the Los Angeles Basin Plan Administrative Record*, at 56-57 (Feb. 2003), *available at* http://www.citiessavejobs.com/dynamic/downloads/individual_download_file_link_english_181.pdf.

limited to, swimming, wading, waterskiing, skin and scuba diving, surfing, white water activities, fishing, or use of natural hot springs.[12]

Once a culvert is classified as a "waters of the United States," the agencies will not relent absent a "structured scientific process" called a Use Attainability Analysis ("UAA"), [13] a process that has had little value in practice. For example, on June 5, 2003, the L.A. Regional Board voted to maintain REC-1 as a designated beneficial use for the culvert. Regional Board staff had conducted a UAA and recommended removal of the swimming designation because there is no access to the culvert and because of the extreme danger in entering the culvert when it contains flood water. The Board rejected the staff's common sense and precautionary recommendation and upheld the swimming designation.

C. Entire Public Storm Drain System Declared "Waters of the United States."

The San Diego Regional Board, ostensibly acting under CWA, issued a permit in 2001 for the public storm drains in San Diego County. The permit defined "waters of the United States" such that: "a Municipal Separate Storm Sewer System (MS4) is always considered a Waters of the United States."[14] The permit defined MS4s to include all "roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, natural drainage features or channels, modified natural channels, man-made channels, or

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12 L.A. Basin Plan at 2-2. *See supra* n.4.

13 40 C.F.R. § 131.10.

14 San Diego Regional Bd. Order No. 2001-01, at D-8 (Feb. 21, 2001), *available at* http://www.swrcb.ca.gov/~rwqcb9/programs/stormwater/sd%20permit/Order%20No.%202001-01%20Final%20with%20attachmentss.pdf.

storm drains."[15] Thus, under this agency's view, the entire municipal storm drain starting at the curb and gutter is "waters of the United States."[16]

Under this approach, all "point sources" that "discharge" to our urban and suburban streets arguably require CWA permits. Are driveways and sidewalks "point sources" bordering "waters of the United States"? To say that the agency's definition brings CWA to the front door is not hyperbole.

Environmental groups are heralding the San Diego permit as a precedent for the nation to follow. An environmental group called the San Diego BayKeeper was paraphrased in the San Diego Tribune as proclaiming that a trial court decision upholding the permit's definition of "waters of the United States" "clears the way for San Diego's storm-water permit to become a national model."[17]

D. Agencies Specify Upland Best Management Practices ("BMPs") And Invade The Land Use Authorities Of Local Government.

Another consequence of the inland extension of CWA jurisdiction is that it is leading water quality regulators to micro-manage local government practices to protect downstream receiving waters. For example, the San Diego Regional Board directs BMPs to be placed as close as possible to where the raindrop first hits the ground: "Use small collection strategies located at, or as close as possible to, the source (*i.e.*, the point where water initially meets the ground)...."[18]

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15 Order No. 2001-01, at D-4.

16 Order No. 2001-01, at D-4.

17 Terry Rodgers, *Water Board Wins Key Urban Run-off Case*, San Diego Union Tribune, Feb. 14, 2003, at B-1.

18 *See* Order No. 2001-01 at 14.

The San Diego Regional Board's permit requires BMPs for a plethora of urban and suburban land uses, requiring mandatory BMPs for residential activities such as home gardening, automobile washing and parking.[19] The San Diego permit requires cities to prohibit their residents from common activities, including hosing off driveways and patios, and washing their cars unless you can catch the rinse water before it enters the catch basin.[20]

These intrusions are affecting quality of life. For example, inspectors enforcing a similar CWA permit for the L.A. region ordered a downtown L.A. landlord who has helped to rehabilitate an area near skid row to stop washing the sidewalk in front of his hotel.[21] According to the L.A. Times, the sidewalk cleaner was admonished to, "[d]rop that hose." The owner said he would "cease and desist from maintaining my properties as any human being would have a right to expect," if the city agreed to clean the sidewalks of the previous night's accumulation of, "urine, human waste, vomit, alcohol, cardboard, clothing, hypodermic needles, crack pipes and bullet casings." Recognizing the landlord's "Catch-22 situation," city officials stressed that their hands were tied by the CWA.

II. THE ECONOMIC CONSEQUENCES OF CURRENT REGULATIONS ARE POTENTIALLY ONEROUS.

A study carried out by engineering experts at the University of Southern California School of Engineering analyzed the stormwater regulations in the Los Angeles area, taking them at "face value," and estimating the

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19 *See* Order No. 2001-01 at 33.

20 San Order No. 2001-01 §§ D.1.b.5, D.1.b.8.

21 *See* Bob Pool, *Dispute Taints Sidewalk Cleanup; Downtown: Officials Say Loft Developer Must Stop Washing Garbage And Human Waste From In Front Of His Building*, L.A. Times, Oct. 8, 2002.

economic consequences of compliance. The following is from the executive summary of the study's findings:

> This study . . . of the potential costs required to meet new and emerging stormwater regulations in the Los Angeles area . . . confirms that advanced treatment of storm flows will likely be required . . . . Such treatment will be extremely costly and will generate significantly negative economic consequences for our region. The principal study case, which contemplates 65 treatment plants to accommodate regional stormwater requirements, shows that:
>
> - The capital costs required to build new collection and treatment facilities range from $43.7 billion to treat flows from about 70% of the historic[al] average annual storm events to $283.9 billion for 97% of the expected storm events.
> - The 20 year present value (cost) of the net economic impacts to each L.A. County household for these required stormwater facilities ranges from about $6,670 to treat the smallest 70% of storms to $41,760 to treat 97% of the expected annual storm events.[22]

These projected costs underscore the potential impact to *Amici Curiae*, and their residents and members, and the need for the Court to halt the extra-jurisdictional action of various agencies under color of CWA.

SUMMARY OF ARGUMENT

CWA defines federal waters in a geographical sense, extending that concept broadly to all truly open bodies of

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22 Peter R. Gordon, et al., *An Economic Impact Evaluation of Proposed Stormwater Treatment for Los Angeles County*, at 1 (Nov. 2002), *available at* http://www.citiessavejobs.com/dynamic/downloads/individual_download_file_link_english_175.pdf.

water that may be regulated under the Commerce Clause, and their adjacent wetlands. Although broad, such jurisdiction does not extend to things without common hydrologic features, such as roadside ditches, drainage ruts, storm drain pipes and culverts, city streets, or the curb and gutter. To hold otherwise would frustrate clear congressional intent and violate principles of federalism woven into CWA.

ARGUMENT

In the case at hand, requiring the Deatons to obtain a federal permit to develop their land-locked property constitutes *ultra vires* agency action, as it improperly attempts to extend CWA jurisdiction beyond congressionally imposed limits and violates the federal-state balance that Congress carefully wove into CWA.

I. CWA JURISDICTION IS LIMITED TO ACTUAL WATER BODIES AND THEIR ADJACENT WETLANDS.

A. In 1972, Congress Expanded The Waters Subject To Federal Water Quality Regulation To Include Open Bodies Of Water Not Navigable In Fact.

In 1972, Congress clearly extended agency jurisdiction under federal water quality law beyond waters that were navigable in fact, rejecting the limited view of navigability of the *Daniel Ball* case.[23] Just as clearly, Congress in 1972 did not extend unbridled discretion to the agencies to define for themselves just how far beyond navigable-in-fact waters the agencies may extend CWA permit programs. Rather, Congress defined jurisdictional waters with reference to precedent involving various rivers across the country.

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23 *The Daniel Ball*, 77 U.S. 557, 563 (1870) ("Those rivers must be regarded as public navigable rivers in law which are navigable in fact.").

Representative Dingell, one of the active supporters of the 1972 CWA, stated in pertinent part:

> [T]he conference bill defines the term "navigable waters" broadly for water quality purposes. It means all 'the waters of the United States' in a geographical sense. It does not mean "navigable waters of the United States" in the technical sense as we sometimes see in some laws.
>
> The new and broader definition is in line with more recent judicial opinions which have substantially expanded that limited view of navigability—derived from the Daniel Ball case (77 U.S. 557, 563)—to include waterways which would be "susceptible of being used *** with reasonable improvement," as well as those waterways which include sections presently obstructed by falls, rapids, sand bars, currents, floating debris, et cetera . . . .[24]

None of the "more recent judicial opinions" with respect to which the 1972 amendments were "in line" extended the concept of navigable waters to things like roadside ditches, or anything other than a truly open water body. Representative Dingell specifically cited to a series of cases that found navigable in law various river reaches including: portions of the Colorado, Green and Grand Rivers in the western United States;[25] an 111-mile stretch of the New River running from Virginia into West Virginia, throughout which there was an "abundance of water;"[26] the Wisconsin River despite channel sections that were "broken and

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24 Remarks of Rep. Dingell, 118 Cong. Rec. 33756 (Oct. 4, 1972).

25 *United States v. Utah*, 283 U.S. 64 (1931).

26 *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 410 (1940).

divided, offering almost insurmountable obstacles;"[27] the Snake Tail Rapids on the East Fork of the Chippewa River in Wisconsin where fast water and protruding rocks made passage "very difficult;"[28] the Namekagon River in Wisconsin, one of the best freshwater bass angling streams in the country;[29] the Rio Grande River on the basis of the potential to restore actual navigable capacity;[30] the Genesee River above Rochester, New York, but not necessarily a turbulent stretch of river 65 miles from the river's mouth;[31] and the Desplaines River in Illinois despite the fact that it "fell into disuse . . . for a hundred years."[32]

In some of the cases to which the legislative history refers, the courts struggled over determining whether reaches of certain rivers were not federal waters because of navigational impediments. Thus, in cases decided before 1972 a river for purposes of federal jurisdiction could be broken up into non-contiguous segments—a rather arbitrary means for the federal government to establish domain. It was this "technical sense" of navigability which allowed rivers to be piecemealed into navigable and non-navigable segments, based on various impediments to actual navigation, that Congress rejected in 1972. The

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27 *Wis. Pub. Serv. Corp. v. Fed. Power Comm'n*, 147 F.2d 743, 745 (7th Cir. 1945).

28 *Wisconsin v. Fed. Power Comm'n*, 214 F.2d 334, 335 (7th Cir. 1954).

29 *Namekagon Hydro Co. v. Fed. Power Comm'n*, 216 F.2d 509, 512 (7th Cir. 1954).

30 *Puente de Reynoso v. City of McAllen*, 357 F.2d 43, 50-51 (5th Cir. 1966).

31 *Rochester Gas & Elec. Corp. v. Fed. Power Comm'n*, 344 F.2d 594, 597, 599 (2d Cir. 1965).

32 *Economy Light & Power Co. v. United States*, 256 U.S. 113, 123-24 (1921).

"geographical sense" adopted by Congress in 1972 swept rivers from start to finish into the ambit of jurisdiction thereby, "encompass[ing] all water bodies, including main streams and their tributaries, for water quality purposes."[33]

Nowhere in CWA itself or the 1972 legislative history does Congress ascribe federal water status to things other than truly open bodies of water—the kinds of waters with banks, shores, and other hydrologic attributes. The extension of federal water status to roadside ditches, drainage ruts, storm drains, curbs and gutters is the creature of unlawful agency action.

B. Congress' Acquiescence In Agency Jurisdiction Over Adjacent Wetlands Defines The Limit Of Permitting Authority Over Things That Are Not Water Bodies.

In 2001 the Court addressed various CWA legislative and rulemaking activity from enactment in 1972 through 1977.[34] Considering legislative proposals to change the definition of "navigable waters" so as to express it in specific terms, the Court commented, "debate on the [legislative] proposals to narrow the definition of navigable waters centered largely on the issue of wetlands preservation."[35] The Court concluded: "Beyond Congress' desire to regulate wetlands adjacent to 'navigable waters,' respondents point us to no persuasive evidence that the House bill was proposed in response to the Corps' claim of jurisdiction over

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[33] Remarks of Rep. Dingell, 118 Cong. Rec. 33756 (1972). *Amici Curiae* are not implying that all water bodies are jurisdictional. Rather, the class of waters regulated as "waters of the United States" under the CWA is limited to actual water bodies and water courses, that also satisfy appropriate elements of the Commerce Clause.

[34] *Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs*, 531 U.S. 159, 174 (2001) ("*SWANCC*").

[35] *SWANCC*, 531 U.S. at 170 (quoting *United States v. Riverside Bayview Homes*, 474 U.S. 121, 136 (1985)).

nonnavigable, isolated, intrastate waters or that its failure indicated congressional acquiescence to such jurisdiction."[36]

Thus, the Court's holding in *Riverside Bayview Homes* that jurisdiction under CWA extends to adjacent wetlands clearly is not the "open door" through which jurisdiction over things other than such wetlands can pass.

II. CWA RESPECTS THE DISTINCTION BETWEEN THE NATIONAL AND THE LOCAL, A RESPECT THAT IS EVISCERATED WHEN AGENCIES REGULATE DRAINAGE RUTS AND CITY STREETS AS IF THEY WERE FEDERAL WATERS.

A. The CWA Provisions Reflect Congressional Sensitivity To Potentially Intrusive Regulation Under Federal Law.

The goals and policies of CWA contain a subsection entitled, "Congressional recognition, preservation, and protection of primary responsibilities and rights of States," which states in pertinent part:

> It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution to plan the development and use (including restoration, preservation, and enhancement) of land and water resources . . . .[37]

CWA is consistent with Congress' stated desire to respect the "primary responsibilities and rights" of state government over land use and water resource matters. Congress took a programmatic approach to the potential water quality impacts of land use and water supply development and management—rather than subjecting

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36 *SWANCC*, 531 U.S. at 170-71.

37 33 U.S.C. § 1251(b).

them to command-and-control permitting under CWA Sections 402 (permits for discharges of pollutants) and 404 (permits for dredge and fill), 33 U.S.C. §§ 1342, 1344.

For example, CWA contains a program through which states develop "areawide waste treatment management plans" to address "substantial water quality control problems" related to "urban-industrial concentrations or other factors."[38] The purpose of these so-called "208 Plans" is to address various water quality issues outside of the federal permitting schemes of Sections 402 and 404. 208 Plans encompass not just urban and industrial sources, but also agricultural, silvicultural, mining, construction, and other potential areawide, nonpoint sources. [39]

CWA Section 208(f) provided grants to the states to develop and operate the 208 Plans.[40] These grants are consistent with the congressional purpose of "encouraging and facilitating the development and implementation" of 208 Plans[41]—as opposed to forcing such local pollution through the eye of a federal regulatory needle.

In 1987, Congress added Section 319, "Nonpoint source management programs," in so doing affirming its policy choice of respecting state authority by dealing with pollution upstream of federal waters programmatically—rather than through command-and-control permitting.[42] Although nonpoint source runoff ("NPS") is not defined in CWA, it is discussed in the legislative history, as including runoff from diffuse sources such as urban areas and

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38 33 U.S.C. § 1288(a)(2), CWA § 208(a)(2).

39 33 U.S.C. § 1288(b).

40 33 U.S.C. § 1288(f).

41 33 U.S.C. § 1288(a).

42 33 U.S.C. § 1329.

farmland,[43] such as city streets, parking lots, lawns, residential areas and construction sites.[44]

NPS runoff is not regulated via federal permits. Rather, Section 319(a)(1) states in pertinent part:

> the Governor of each State shall . . . prepare . . . a report which . . . (C) describes the process . . . for identifying best management practices [BMPs] and measures to control each category and subcategory of nonpoint sources and, where appropriate, particular nonpoint sources identified under subparagraph (B) and to reduce, to the maximum extent practicable, the level of pollution resulting from such category, subcategory, or source . . . .[45]

The Section 319 BMPs "are intended to be the primary water quality improvement and water quality compliance mechanism" for NPS.[46] Thus, the implementation of practicable BMPs is the policy approach of Section 319 to reduce NPS pollution. This approach is fundamentally different from the Section 402 and 404 permitting schemes, and reflects congressional intent to distinguish local NPS issues from the permitting programs for federal waters.

CWA's extensive planning provisions for potential pollution from various kinds of land use become superfluous if federal waters are defined so broadly that they encompass the erosion rut, the curb, the street and gutter. Under such

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43 *See, e.g.*, Remarks of Sen. Chafee, 133 Cong. Rec. 1582 (1987) ("Nonpoint pollution is pollution that does not come out of a specific pipe. It is pollution that comes from runoff—from farmlands, for example, or from parking lots in cities.").

44 *See, e.g.*, Remarks of Sen. Durenberger, 133 Cong. Rec. 1276 (1987) (NPS includes sources such as "residential areas, streets, roads, highways, other developed areas.").

45 33 U.S.C. § 1329(a)(1).

46 Remarks of Sen. Strangeland, 133 Cong. Rec. 991 (1987).

a definitional scheme, these land uses would discharge routinely into "federal" waters, triggering the permitting provisions of Sections 402 and 404. Clearly, this result was not contemplated by Congress, which limited the extent of federal waters so that there would be a sphere within which local government could operate to address water quality through non-regulatory programs.

B. Legislative History Reflects Congress' Intent To Avert Federal Land Use Planning Under CWA.

The legislative history reflects controversy regarding Section 319, the nonpoint source ("NPS") provision, as Republicans were concerned that it constituted federal land use planning, extending the reach of CWA to purely local matters. Senator Mitchell responded to these concerns in no uncertain terms:

> In his statement the other day, the distinguished minority leader referred to the nonpoint provision of this bill as 'Federal land use planning.'
>
> This is a serious charge. It is an erroneous charge.
>
> This bill does not—I repeat does not—provide for Federal intervention in State and local land use planning decisions.
>
> The nonpoint provision gives States the lead role in addressing nonpoint pollution problems. The Federal Government plays a limited, support role.
>
> Further, the bill does not direct States to establish regulatory programs for control of nonpoint sources of pollution. I repeat that the bill does not direct States to establish regulatory programs for control on nonpoint sources of pollution. It specifically refers to a wide range of nonregulatory programs such as education, training, technical assistance, and

> demonstration, while not preventing a State from adopting a regulatory program where needed.[47]

Senator Mitchell concluded emphatically:

> So it is absolutely false, untrue and misleading for anyone to say that this is Federal land use planning.[48]

This legislative history reflects Congress' recognition that the 1972 CWA did not federalize land use planning, as well as Congress' intent that the 1987 amendments did not move federal water quality regulation in that direction. Congress in 1987 evinced its intent to abide by the original goals and policies of the 1972 CWA, to respect the "primary responsibilities" of the states with respect to land use planning.

C. CWA Respects The Principles of Federalism.

The federal-state balance of CWA reflects congressional design based on principles of federalism. As stated by the Court in the *Morrison* decision, "[t]he Constitution requires a distinction between what is truly national and what is truly local."[49] As recognized by the Court in the *SWANCC* and *Hess* decisions, the "regulation of land use" is a "function traditionally performed by local governments."[50] Land use authority is an aspect of the "generalized police power," reserved to the states under the Constitution. As the Court stated in *Morrison*:

> [T]he principle that '[t]he Constitution created a Federal Government of limited powers,' while

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47 Remarks of Sen. Mitchell, 133 Cong. Rec. S1006 (daily ed. Jan. 21, 1987).

48 Remarks of Sen. Mitchell, 133 Cong. Rec. S1006.

49 *United States v. Morrison*, 529 U.S. 598, 617-18 (2000).

50 *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 44 (1994) (quoted favorably in *SWANCC*, 531 U.S. at 174).

> reserving a generalized police power to the States, is deeply ingrained in our constitutional history.[51]

By limiting the reach of federal waters and crafting programs to address the impacts of local land uses on water quality, Congress reserved to the states a role in water quality regulation, in accordance with principles of federalism.

D. Federalism Protects The Rights of Individuals From Tyranny, And Cannot Be Dismissed Because State Government Invites Federal Regulation.

The Court may hear from state water quality regulators that they would acquiesce in a construction of jurisdictional waters even broader than the one conceded here. The reason for this is clear: in many states, U.S. EPA has delegated the administration of CWA to state regulators. The power of state regulators to which U.S. EPA has extended delegation is promoted by an expansive interpretation of "waters of the United States."

However much state water quality regulators may want to feed at the trough of federal power, the Constitution should not, and indeed cannot, yield to such assuaging. As the Court in *Lopez* observed, "State sovereignty is not just an end in itself . . . ."[52] The Court explained:

> [T]he Constitution divides authority between federal and state governments for the protection of individuals. . . . [F]ederalism secures to citizens the liberties that derive from the diffusion of sovereign power.[53]

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51 *Morrison*, 529 U.S. at 619 (citations omitted).

52 *United States v. Lopez*, 514 U.S. 549, 576 (1995).

53 *Lopez*, 514 U.S. at 576 (quoting *Coleman v. Thompson*, 501 U.S. 722, 759 (1991) (Blackmun, J., dissenting)).

The federal-state balance of CWA is there for the protection of people, cities and their citizens who have a reasonable expectation, indeed a constitutionally protected one, to have a local sphere free of federal coercion, and landowners who should not be subject to federal intrusion and potential liability when building a home in an upland area. President Reagan understood the importance of this balance when he expressed concern that CWA in 1987 was at risk of becoming overly intrusive. The President stated in pertinent part:

> This new program threatens to become the ultimate whip hand for Federal regulators. . . . [U.S. EPA] will be able to become a major force in local zoning decisions that will determine whether families can do such basic things as build a new home.
>
> ....
>
> Let me repeat—controlling nonpoint source pollution has the potential to touch, in the most intimate ways, practically all of us as citizens, whether farmers, business people, or homeowners.[54]

In response to President Reagan, Senator Mitchell offered assurances[55] that CWA did not constitute federal land use planning. The Deatons and *Amici Curiae* are asking the Court to ensure that the agencies that implement CWA operate within these carefully circumscribed limits set by Congress.

CONCLUSION

In conclusion, *Amici Curiae* respectfully request the Court to accept *certiorari* of the *Deaton* decision, in order to specify the limits of CWA jurisdiction and elucidate how principles of federalism animate this important issue.

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54 133 Cong. Rec. 2392 (1987).

55 *See supra* nn.47, 48.

Respectfully submitted,

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No. 03-701

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In The
Supreme Court of the United States

JAMES S. and REBECCA DEATON,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF AMICUS CURIAE OF THE NATIONAL MINING ASSOCIATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Are a roadside ditch and the wetland next to it "navigable waters" under the Clean Water Act?

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INTERESTS OF AMICUS CURIAE

Amicus Curiae, the National Mining Association (NMA), is a trade association representing producers of most of America's coal, metals and industrial and agricultural minerals.[1] The principal purpose of *amicus* is to represent those with interests in the Nation's mineral resources industries in important public policy issues affecting the development and use of mineral resources. NMA members' mining operations are located throughout the country in nearly all the federal appellate jurisdictions and within many of the different divisions and districts designated by the U.S. Army Corps of Engineers (Corps).

Mine sites are characterized by a variety of different geographic and physical features. For example, many mines are located in extremely remote and arid regions. It is not uncommon for drainage features in these areas to rarely flow and, even then, only in response to a substantial storm event. Similarly, many sites cover vast amounts of acreage and are located in the vicinity of irrigation canals, drainage ditches, and similar water management systems. Consequently, NMA members are interested in the establishment of a clear and predictable scope for federal Clean Water Act (CWA) jurisdiction, 33 U.S.C. §§ 1251 *et seq.* (1972) (amended 1977 and 1987). Predictability of regulation is especially important to the mining

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[1] NMA has received the consent of the parties to file this brief as *amicus curiae*. The letters of consent have been filed with the Clerk of the Court. Pursuant to Rule 37.6 of this Court, *amicus* represents that counsel for *amicus* authored this brief in its entirety and that no person or entity other than *amicus* and its representatives made any monetary contribution to the preparation or submission of this brief.

industry given the extraordinary amount of time, money and planning inherent to the development and management of most mining operations.

Mining companies have unique technological, logistical and economic challenges in that mineral resources are fixed in location and limited in quantity.[2] The steps related to the development of the mineral resources involve a substantial upfront commitment of money and time. Assuming minerals exist in commercial quantities, "it can be expected that around 12 years will elapse between the start of [an] exploration [program] and commencement of mine production." Anthony M. Evans, *Introduction to Mineral Exploration* 12 (1995). The amount of time it takes to permit a mine and the amount of investment essential for developing a mine translates to a staggering financial commitment. For example, it is estimated that the engineering, planning and development of modern coal mines must be supported by the investment of hundreds of millions of dollars. *See* William B. Prince, *Joint Development of Coal and Coalbed Methane*, 48 Rocky Mtn. Min. L. Inst. 19-1, 19-7 (2002) (describing these costs). Accordingly, unanticipated delays and the associated unforeseen costs related to inconsistent regulation impair the economic viability of a new or ongoing operation. *See* Ian C. Runge, *Mining Economics and Strategy* 29 (1998) (describing economic uncertainty in mine development).

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[2] The scarcity of hard rock minerals is well documented. "Known ores constitute less than 0.01% of the metal content of the upper 1 km of continental crust. Thus mines can only be located in those few places where economically viable deposits have been formed and discovered . . . " National Research Council, *Hardrock Mining On Federal Lands* 23 (1999).

To the dismay of NMA members and since this Court's decision in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Eng'rs* (*SWANCC*), 531 U.S. 159 (2001), the U.S. Circuit Courts of Appeal have confounded rather than clarified the analysis for determining what portions of a mine site are potentially regulated as "navigable waters" subject to CWA jurisdiction. As a result of disjunctive appellate court jurisdictional analyses, the regulated community, including NMA members, cannot determine with certainty at what point a nonnavigable water falls within the ambit of the CWA. Indeed, if NMA members evaluate jurisdiction based on the current "guidance" from the courts, they are forced to assess the same sorts of features at different properties in different ways based upon the view of the specific circuit in which the site is located. Federal regulation should not, as a matter of public policy, be predicated upon a balkanized system of circuit-specific tests. The uncertainty and attendant confusion over the scope of federal regulation warrant review by this Court.

OVERVIEW OF PERMITTING OBLIGATIONS AT MINING OPERATIONS

Every mining enterprise is subject to myriad federal and state regulatory regimes starting from when the project is merely a glint in the prospector's eye to the final phases of mine closure and site reclamation. Detailed, rigorous mine planning obligations, intended to prevent or minimize mining-related environmental impacts, are incorporated in federal and state laws including the Federal Land Policy and Management Act (FLPMA), 43 U.S.C. §§ 1701 *et seq.* (1976) (amended in 1988), and the

Surface Mining Control and Reclamation Act (SMCRA), 30 U.S.C. §§ 1201 *et seq.* (1977).

The overarching environmental requirements of the land management statutes and mining-related statutes are supplemented by the numerous federal, state and local media-specific environmental programs established, for example, under the Clean Air Act, the Resource Conservation and Recovery Act, and the CWA. As a consequence, in addition to the environmental stewardship obligations under FLPMA or the detailed planning and reclamation provisions of SMCRA, mine operators must – consistent with the CWA – obtain a permit for a discharge of a pollutant from a point source to navigable waters, i.e., those subject to CWA jurisdiction. *See* Petition at 3-5 (discussing the statutory and regulatory framework related to CWA permitting obligations). Consistently, permits must be obtained for discharges of fill material into jurisdictional waters associated with the construction of support facilities, access roads, pipelines and a host of other commonplace mine-related activities.

The Corps may (and frequently does) take more than a year to process and issue a CWA permit covering discharges of fill material to jurisdictional waters. *See National Assoc. of Home Builders v. U.S. Army Corps of Eng'rs*, ___ F. Supp.2d ___, 2003 WL 23112466, *2 (D.D.C. November 24, 2003) (recognizing the delay inherent in the Corps' permitting process); William L. Want, *Law of Wetlands Regulation* 6, 8-9 (2003) (same). Mine operators must, as a practical matter, conduct a site delineation and assess CWA jurisdiction well in advance of any projects that could potentially require a permit. Front-end jurisdictional waters planning is even more essential given that Corps-approved delineations cannot be challenged in court

until after a permit applicant is denied a permit or declines to accept a proffered permit. *See* 33 C.F.R. § 331.12 (2000) (establishing that a person may not file for judicial review based on a permit denial or failure to accept a proffered permit without exhausting administrative remedies). *See also Rueth v. U.S. Environmental Protection Agency*, 13 F.3d 227, 230 (7th Cir. 1993) (indicating that wetland jurisdiction questions are not ripe for review); *Southern Pines Assoc. v. U.S.*, 912 F.2d 713, 713-714 (4th Cir. 1990) (judicial review precluded until enforcement action initiated). *See generally* Final Rule Establishing an Administrative Appeal Process for the Regulatory Program of the Corps of Engineers, 65 Fed. Reg. 16486, 16488 (March 28, 2000) (clarifying lack of pre-enforcement review). As a result, prudent mine planning and the realities of the Corps' permit program dictate that the nature and extent of CWA permitting obligations be determined early in the mine planning process. If the scope of a mine operator's permit obligations is in flux, years of planning can be compromised, resulting in delays that can impair a mine's viability.

REASONS FOR GRANTING THE PETITION

I. The Court Should Grant The Writ Of Certiorari To Resolve The Irreconcilable Conflict Between Decisions In The Fourth, Sixth And Ninth Circuits And Decisions In The Fifth Circuit

This case presents an important question whether the mere potential for a connection or "nexus" with traditionally navigable water can extend the reach of the CWA to ditches, culverts, or other nonnavigable features. The Fifth

Circuit says no absent a "close, direct and proximate link." *Rice v. Harken Exploration Co.*, 250 F.3d 264, 272 (5th Cir. 2001). In contrast, the Fourth Circuit answers yes as long as there may be "some connection." *U.S. v. Deaton*, 332 F.3d 698, 709 (4th Cir. 2003) *petition for cert. filed* (U.S. November 10, 2003) (No. 03-701). The differences between the circuits cannot be reconciled.

While this Court has recognized that there are "inherent difficulties" in defining "precise bounds to regulable waters," it has also acknowledged that those bounds are not limitless. *U.S. v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 134 (1985) (the Corps has jurisdiction over wetlands "inseparably bound up" with navigable waters).[3] The language of the statute establishes a basis for considering those bounds. *See SWANCC*, 531 U.S. at 167 (recognizing that "[t]he term 'navigable' has at least the import of showing us what Congress had in mind as its authority for enacting the CWA"). In that regard, this Court has instructed that to establish jurisdiction over "waters," there must be a "significant nexus" with a traditionally navigable water. *Id.*

In the case at issue, the Fourth Circuit eviscerates *SWANCC*'s core principle requiring a "significant nexus" to navigable waters by extending the reach of CWA to "any branch of a tributary system that *eventually* flows into a navigable body of water." *Deaton*, 332 F.3d at 711 (emphasis

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[3] The language in the statute specifies that the CWA applies to "navigable waters" further defined to mean "waters of the U.S. including the territorial seas." 33 U.S.C. § 1362(7) (1972) (amended 1977 and 1987). *See generally* Petition at 3-5 for a description of the statutory and regulatory language defining "navigable waters."

added). When this Court in *Riverside Bayview* found in the CWA intent to "regulate at least *some* waters that would not be deemed 'navigable,'" 474 U.S. at 133 (emphasis added), it did not mean, as the Fourth Circuit suggests, *all* non-navigable waters with "some connection" (i.e., anything that "eventually provides 'additional matter'") to navigable waters, *Deaton*, 332 F.3d at 709-710. Under the Fourth Circuit's reading of the law, the *SWANCC*-described nexus for finding jurisdiction is rendered meaningless.

Other circuits have similarly run afoul of *SWANCC*. The Sixth Circuit finds that a hydrologic connection from a wetland to a manmade drain to a traditionally navigable water is sufficient to assert CWA jurisdiction because the flows "could affect" a navigable water. *U.S. v. Rapanos*, 339 F.3d 447, 453 (6th Cir. 2003) *petition for cert. filed* (U.S. December 22, 2003) (No. 03-929). Similarly, in the Ninth Circuit, irrigation canals that retain water via a system of gates are jurisdictional because the gates could fail and allow flows to reach a navigable water. *Headwaters, Inc. v. Talent Irrigation District*, 243 F.3d 526, 534 (9th Cir. 2001). That attenuated connection is far less than the "significant nexus" required by *SWANCC*.

In stark contrast, the Fifth Circuit finds these formulations of CWA jurisdiction "unsustainable under SWANCC." *U.S. v. James Hamilton Needham, et al.*, ___ F.3d ___, 2003 WL 22953383, *3 (5th Cir. December 16, 2003). Heeding this Court's warning not to read the word "navigable" out of the CWA, the Fifth Circuit has held that under *SWANCC*, "a body of water is subject to regulation . . . if the body of water is actually navigable or is adjacent to an open body of navigable water." *Rice*, 250 F.3d at 269. It follows then that "puddles, sewers, roadside ditches and

the like" are not conduits for extending the scope of CWA jurisdiction. *Needham*, WL 22953383 at *3.

The product of the current jurisdictional split in the circuits is widespread uncertainty regarding the applicability of the CWA to nonnavigable waters. This uncertainty has direct and enormous consequences for mine planning and development. Mine operators must design their facilities around the location of the ore body while accounting for geographical limitations at the site. Accordingly, mine-related activities will occur in and around irrigation, drainage or similar ditches and water features. The post-*SWANCC* confusion creates different federal CWA permitting obligations in different parts of the country.

A mine operator in West Virginia, Kentucky or Nevada who applies *Deaton* or its Sixth and Ninth Circuit corollaries evaluates whether the discharge could eventually reach a jurisdictional water. Accordingly and in the absence of any limiting principles, the operator may be forced to undertake the lengthy and costly CWA permit process to cover potential discharges related to access road construction in the vicinity of a ditch or drainage (no matter how remote) because those discharges *could affect* traditionally navigable waters. These types of decisions can be speculative, produce absurd results, and trigger federal CWA permits for nearly every project at a site. On the other hand, an operator, evaluating permitting issues for a similar project in the vicinity of comparable features in Texas, could reasonably conclude that the link between the road construction and any traditionally navigable water is too far removed to trigger jurisdiction and would not pursue a permit from the Corps.

The appellate court disagreement regarding CWA jurisdiction is, therefore, problematic in that it produces wildly different, irreconcilable results. Members of the regulated community are unable to evaluate, with reasonable certainty, the scope of federal regulation at existing or future projects. In short, this real and present circuit conflict warrants this Court's review.

II. The Post-*SWANCC* Confusion Compromises The Integrity Of The Regulatory Process

The circuit conflict is symptomatic of the confusion that pervades the Corps' administration of the Section 404 program. Just as the circuits have reached markedly different conclusions about the post-*SWANCC* reach of the CWA, the Corps likewise struggles with supplying a coherent set of principles by which regulated parties can reasonably ascertain what is expected of them. The prospect for deriving such guidance through the administrative process fashioned by the Corps is remote. The process is ill-suited for producing what elementary fairness compels – clarity and consistency.

The Corps is a highly decentralized organization so "[m]ost of the authority for administering the program has been delegated to the thirty six district engineers and eleven division engineers."[4] 33 C.F.R. § 320.1(a)(2) (2000). Most CWA jurisdictional decisions occur in the field as a result of case-by-case determinations for permit applications,

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[4] There are now more than thirty six districts established by the Corps. *See* U.S. Army Corps of Engineers, Regulatory Program Website <http://www.usace.army.mil/inet/functions/cw/cecwo/reg/district1.htm>.

33 C.F.R. § 325.1 (1990), or separate jurisdictional determinations, 33 C.F.R. § 325.9 (1990). These determinations by the district engineers may be appealed administratively to the appropriate division engineer (and the designated review officer), 33 C.F.R. § 331.7(a) (2000), but the administrative decisions carry no "precedential value" even within the same Corps district. 33 C.F.R. § 331.7(g).

The results of this administrative process vary widely among and within the districts. For example, the Sacramento District generally declines to regulate drainage and irrigation ditches constructed in uplands while the Omaha District has concluded that any road ditches that capture and convey waters are, without limitation, jurisdictional. *Compare* Leavell/Grey Property, File No. 1997-00375 (U.S. Army Corps of Engineers, Sacramento District 2002) (appeal decision) *with* Frank Krejci, File No. 2000-11140 (U.S. Army Corps of Engineers, Omaha District 2001) (appeal decision). Within the same district, indeed on the same property, the Corps will reach different results about CWA jurisdiction. *See, e.g.*, Marek Property, File No. 2001-75341 (U.S. Army Corps of Engineers, Sacramento District 2003) (appeal decision) (questioning the agency's inconsistent jurisdictional determinations on roadside channels located on property). We respectfully cross-reference the Petition for Writ of Certiorari in *Newdunn Associates LLP v. U.S. Army Corps of Eng'rs*, No. 03-637 at 20-22 (Oct. 30, 2003), for its examples of inconsistent agency decision making on CWA jurisdiction.

The inconsistency in the results of the administrative review process erodes confidence in the process. But even worse, the hardship of the process itself can be so substantial that it often deters the pursuit. Presently, landowners faced with the uncertain prospects about the applicability

of the Section 404 to their activities have several choices: (1) proceed without Corps' permission; (2) immediately acquiesce and apply for a permit; or (3) seek a determination from the Corps regarding the scope of CWA jurisdiction.

The first choice carries grave risk of civil and criminal sanctions if the district engineer decides the landowner chose poorly. The second choice embodies substantial burdens in terms of time and expense. One study found the mean cost of preparing an individual permit application to exceed $270,000, excluding the expenses related to satisfying permit stipulations such as mitigation and design changes to the proposed project. David L. Sunding & David Zilberman, *Non-Federal and Non-Regulatory Approaches to Wetlands Conservation: A Post SWANCC Exploration of Conservation Alternatives* at 7 (Jan. 2003) (available at <http://www.housingandenvironment.org/Text%20Files/Wetlands_Final.PDF>). On average, these individual permits required a total of 788 days to prepare and obtain a decision, with 405 of those days involving the Corps' deliberations. *Id.* at 8.

Finally, a project proponent can request that the Corps issue a jurisdictional determination as to whether an area is subject to regulatory jurisdiction under Section 404. *See* 33 C.F.R. § 325.9 (1990) (describing authority of Corps to issue such determinations). However, this determination cannot "include determinations that a particular activity requires a . . . permit." 33 C.F.R. § 331.2 (2000) (definition of *jurisdictional determination*). And, this is not the only caveat or limitation. The determination remains in effect for only five years, hardly providing sufficient repose on a threshold question that could sink many an enterprise. *See* U.S. Army Corps of Engineers, Regulatory

Guidance Letter 94-01, *Expiration Dates for Wetlands Jurisdictional Delineations* (May 23, 1994). But, without question, the most unsatisfactory aspect of this path is the absence of any recourse to a neutral arbiter if the landowner disagrees that the area is subject to Section 404. While a jurisdictional determination can be administratively appealed, it cannot be appealed to court. Instead, if the project proponent is dissatisfied with the scope of jurisdiction defined by the administrative process, the process cruelly redirects one to the second choice – seek a permit, decline it, and then exhaust "all applicable administrative remedies" before seeking judicial review. 33 C.F.R. § 331.12 (2000).

The pervasive uncertainty on the threshold question of regulatory jurisdiction denies the regulated community any real choices since under the present circumstances none of these choices can be truly informed ones. The present uncertainty combined with the undue process (and its hardship) prescribed by the agency makes reliance more uncertain, investments less justified, and the program less credible. The Court should take this case to provide clarity and restore integrity to the process.

III. The Court's Guidance Is Necessary Because The Executive Branch Has Abdicated Its Prerogative To Provide National Policy On CWA Jurisdiction

Ordinarily, one would expect the Executive Branch to exercise its prerogative and provide the public the certainty it deserves with respect to the scope of CWA regulation. The Executive Branch has, however, recently announced that it is declining to provide guidance and policy on this important national question. As a consequence, without this Court's intercession in this case, the

plans and investments of NMA's members remain intolerably at risk to the whims of the numerous district engineers attempting to draw jurisdictional lines without principled guidance.

By most accounts, *SWANCC* was a significant ruling addressing the scope of the CWA. *See, e.g.*, Sheila Deely and Mark Latham, *The Federal Wetlands Program: A Regulatory Program Run Amuck*, 34 Envtl. L. Rep. (Envtl. L. Inst.) 966, 966-967 (April 25, 2003) (characterizing *SWANCC* as "dramatically altering" the jurisdictional framework); Pat Parenteau, Position Paper on CWA Jurisdiction Pursuant to SWANCC presented to Administrator Whitman United States Environmental Protection Agency by the Association of State Wetland Managers and the Association of State Floodplain Managers (December 2001) (referencing turmoil since *SWANCC*) (transcript available at <http://www.aswm.org/fwp/swancc/position.pdf>); William Funk, *The Court, the Clean Water Act and the Constitution: SWANCC and Beyond*, 31 Envtl. L. Rep. 10741 (Envtl. L. Inst.) (July 2001) (referencing potentially staggering impacts for environmental law related to *SWANCC*). This is precisely how the agencies' chief legal officers characterized the decision days after its issuance. *See* Memorandum from Gary S. Guzy, General Counsel, U.S. Environmental Protection Agency and Robert M. Andersen, Chief Counsel, U.S. Army Corps of Engineers, on Supreme Court Ruling Concerning CWA Jurisdiction Over Isolated Waters, (January 19, 2001) (available at <http://www.spk.usace.army.mil/pub/outgoing/co/reg/SWANCC.pdf>). Notwithstanding this characterization, the agencies' lawyers concluded "that most CWA jurisdiction remains basically intact," *id.* at 5, and advised that the agencies continue to assert jurisdiction "upstream to the highest

reach of the tributary system, and over all wetlands adjacent to any and all of those waters." *Id.* at 6. *Compare with SWANCC*, 531 U.S. at 176-77, 189-90 n.14 (recognizing majority opinion as drawing a jurisdictional line that invalidates not only the migratory bird rule but jurisdiction over "intermittent rivers, streams, tributaries and perched wetlands that are not contiguous or adjacent to navigable waters") (Stevens, J. *dissenting*).

Whether due to confusion related to the post-*SWANCC* jurisprudence or to discomfort with the agencies' miserly view of the "significance" of this Court's ruling, the Corps and EPA proceeded to take a second look at *SWANCC*'s effect on the CWA state of regulatory affairs in different ways. First, the chief legal officers have raised questions about the basis for asserting jurisdiction over certain nonnavigable waters. *See* Memorandum from Robert F. Fabricant, General Counsel, U.S. Environmental Protection Agency and Steven J. Morello, General Counsel, U.S. Army Corps of Engineers, *Guidance For Asserting Federal Jurisdiction Over Isolated Wetlands In Response to U.S. Supreme Court Decision in SWANCC Case*, 68 Fed. Reg. 1991, 1996 (January 15, 2003) (2003 Guidance). Second, the agencies also initiated a rulemaking in order to "help . . . the public understand[] what waters are subject to CWA jurisdiction." Advance Notice of Proposed Rulemaking on the Clean Water Act Regulatory Definition of "Waters of the United States," 68 Fed. Reg. 1991, 1993 (January 15, 2003). Quite apart from the fact that it has been "some time" since the agencies engaged the public in a discourse on this question, *id.*, the agencies specifically recognized that the public interest would be served by a rulemaking "to ensure that [the regulations] are consistent with the *SWANCC* decision." *Id.*

Unfortunately, the Executive Branch has now informed the regulated community that it is not up to the task. The agencies have decided they will not promulgate a rule to clarify jurisdiction under the CWA. *See* E.P.A. and U.S. Army Corps of Engineers Press Release (December 16, 2003) (transcript available at <http://yosemite.epa.gov/opa/admpress.nsf/b1ab9f485b098972852562e7004dc686/540f28acf38d7f9b85256dfe00714ab0?OpenDocument>). Instead, NMA's members and others with real property interests, are cast adrift with instructions to navigate the protracted and perilous case-by-case administrative process. The sole compass is the 2003 Guidance that raises – but does not answer – the lingering questions about the basis for asserting jurisdiction over waters other than those that are navigable, their primary tributaries and wetlands adjacent to those waters. *See generally* 2003 Guidance (cataloging post-*SWANCC* jurisprudence on these matters).

NMA's members are left with an unsatisfactory choice; they can incur substantial expense and delay to obtain a permit that may be unnecessary, or proceed at grave risk of enforcement sanctions if a district engineer deems the choice unwise. The status quo may be perfectly acceptable to those charged with administering the regulatory program. But for those who must endure the hardship of the process itself, further guidance from this Court is now essential.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

DATED: January 30, 2004.

Respectfully submitted,

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IN THE

Supreme Court of the United States

JAMES S. DEATON, *et ux.*

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for A Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS LEGAL FOUNDATION, NATIONAL ASSOCIATION OF REALTORS, REAL ESTATE ROUNDTABLE, ASSOCIATED GENERAL CONTRACTORS OF AMERICA, NATIONAL ASSOCIATION OF INDUSTRIAL & OFFICE PROPERTIES, NATIONAL MULTI HOUSING COUNCIL, INTERNATIONAL COUNCIL OF SHOPPING CENTERS, ASSOCIATED BUILDERS & CONTRACTORS, AND NATIONAL APARTMENT ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

This case presents the question whether a shallow roadside ditch, situated at the highest point on the Delmarva Peninsula eight miles away from any truly navigable water, is nonetheless a federal "navigable water" under the Clean Water Act simply because rainfall might "eventually flow" from that ditch in a downstream direction. This question has divided the Circuits.

In the decision below, the Fourth Circuit approved the U.S. Army Corps of Engineers' jurisdiction over a rural roadside ditch and nearby wetlands because water might "eventually flow[]" from the ditch to distant navigable waters. Pet. App. 20a. The Fifth Circuit has held that "this definition is unsustainable under" Fifth Circuit law and this Court's decision in *Solid Waste Agency* v. *United States Army Corps of Engineers*, 531 U.S. 159 (2001). See *United States* v. *Needham (In re Needham)*, No. 02-30217, 2003 WL 22953383, at *3 (5th Cir. Dec. 16, 2003).

The questions presented are:

1. Whether the roadside ditch and the wetland next to it are "navigable waters" under the Clean Water Act?

2. Whether Congress' commerce power over navigation allows the federal regulation of the remote wetland or roadside ditch?

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STATEMENT OF INTEREST

Amici Curiae are organizations representing a wide variety of individuals and entities that own, develop, purchase, sell and improve land in each of the 50 States.[1] These individuals and entities hold and control land as owners and managers of residential and commercial property; facilitate the purchase and sale of land as real estate brokers and agents; and work the land as contractors, construction supervisors, equipment operators and laborers. Under the Clean Water Act ("CWA"), if they or their clients propose to authorize or engage in activities involving the movement of earth in federal "navigable waters" (rather than on land or in the waters of the States), they must first obtain a permit from the U.S. Army Corps of Engineers (the "Corps"). See 33 U.S.C. § 1344(a). *Amici* have a substantial interest in the establishment of proper and predictable boundaries to the Corps' geographic jurisdiction under the CWA.

Amici are gravely concerned that the Fourth Circuit's decision allows the Corps to subject businesses and individuals to expansive, unjustifiably expensive and legislatively unauthorized assertions of federal civil and criminal jurisdiction. The decision below approved the Corps' claim of jurisdiction far upstream of truly navigable waters, through the non-navigable tributaries and to the tip of every ditch and rivulet in the nation. This decision extends federal regulatory authority far beyond the letter and intent of the CWA into the realm of state and local authority over land and water use. At the same time, through an expansive

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[1] No person or entity other than *amici*, their members or their counsel made a monetary contribution to the preparation or submission of this brief. Further, no counsel for any Petitioner or Respondent authored this brief in whole or in part. Sup. Ct. R. 37.6. The parties have consented to the filing of this brief; and the consent letters have been filed with the Clerk of the Court. *Id.* 37.3.

application of judicial deference to the Corps, the Fourth Circuit's decision eliminates the federal courts as a check on that agency's expansion of its own power and sacrifices important protections for individual liberty. These holdings present important questions of federal law; they are inconsistent with this Court's decision in *Solid Waste Agency* v. *United States Army Corps of Engineers*, 531 U.S. 159 (2001) ("*SWANCC*"); and they conflict with the decisions of another court of appeals.

The interests of the individual *amici* are as follows:

The National Federation of Independent Business Legal Foundation ("NFIB Legal Foundation") is a nonprofit, public interest law firm established to protect the rights of America's small-business owners. The NFIB Legal Foundation is also the legal arm of the National Federation of Independent Business ("NFIB"), the nation's oldest and largest organization dedicated to representing the interests of small-business owners. The approximately 600,000 members of NFIB own a wide variety of America's independent businesses, including over 20,000 construction firms and over 8,500 homebuilders. The NFIB Legal Foundation is concerned that the Fourth Circuit's decision will dramatically increase costs of regulatory compliance and expose small businesses and their owners to civil and criminal penalties for engaging in ordinary and everyday activities.

The National Association of Realtors ("NAR") is a non-profit professional association of persons in the real estate industry. NAR's members include nearly one million professionals involved in all aspects of the real estate profession. NAR is a champion of the rights and interests of real property owners throughout the country.

The Real Estate Roundtable ("Roundtable") brings together leaders of the nation's top public and privately-held real estate ownership, development, lending and management firms with the leaders of national real estate trade associations

to address key national policy issues relating to real estate and the economy, including environmental and land use issues. Collectively, Roundtable members hold portfolios containing over five billion square feet of developed property valued at more than $450 billion. Participating trade associations represent more than one million people involved in virtually every aspect of the real estate business.

The Associated General Contractors of America ("AGC") is the oldest and largest national trade association in the construction industry. A nonprofit corporation founded in 1918 at the express request of President Woodrow Wilson, AGC now represents more than 33,000 firms in more than 100 chapters throughout the United States. AGC's members include more than 7,000 of the nation's leading general contractors, 12,000 specialty contractors, and 14,000 material suppliers and service providers to the construction industry. AGC members construct commercial buildings, shopping centers, factories, warehouses, highways, bridges, tunnels, airports, waterworks facilities and multi-family housing units; and they prepare sites and install the utilities necessary for housing development. AGC members engage every day in dredge-and-fill activities in waters and wetlands. Whether those activities require a permit from the Corps depends upon statutory terms that agencies and courts have found difficult to construe. The resulting uncertainty over the scope of federal jurisdiction has unfairly exposed contractors to the risk of civil and criminal liability under the CWA.

The National Association of Industrial and Office Properties ("NAIOP") is the nation's leading organization of developers of, investors in and owners of commercial real estate. NAIOP helps its over 100,000 members to create, protect and enhance the value of commercial and industrial real estate and promotes grassroots public policy initiatives related to real estate development.

The National Multi Housing Council ("NMHC") represents the largest and most prominent apartment firms in the United

States. NMHC's members are engaged in all aspects of the apartment industry, including ownership, development, management, and financing. NMHC advocates on behalf of rental housing, conducts apartment-related research and promotes the desirability of apartment living.

The International Council of Shopping Centers ("ICSC") is the premiere global trade and professional association of the retail real estate industry. ICSC's more than 44,000 members include shopping center owners, developers, managers, marketing specialists, investors, retailers and brokers, as well as academics and public officials. The principal aims of ICSC are to advance the development of the shopping center industry and to establish the individual shopping center as a major institution in the community.

Associated Builders and Contractors, Inc. ("ABC") is a national trade association of more than 23,000 construction contractors and related firms. The members of ABC and the hundreds of thousands of construction supervisors, equipment operators and laborers they employ must deal every day with the Corps' regulatory permitting program and have a deep interest in ensuring that the agency operates within predictable and statutorily authorized bounds.

The National Apartment Association ("NAA") is the largest national federation of state and local apartment associations. NAA is comprised of 155 affiliates and represents more than 30,000 professionals who own and manage more than 4.5 million apartments.

REASONS FOR GRANTING THE PETITION

Petitioners' unfortunate experience could have happened to any property owner or contractor in the nation. This case began nearly 14 years ago, when James and Rebecca Deaton dug into the earth in a low spot on their property that a Corps field inspector classified as a "wetland." Pet. 1. Of critical importance, the Corps classified the low spot as a *federal*

wetland, or "navigable water," even though the property lies miles from the nearest truly navigable water and even though the Corps has not been able to show that the Deatons' digging ever affected that distant waterway. See *id.*

The Corps' rationale for asserting federal jurisdiction has changed over the course of this litigation. See *id.* at 7, 27. In its present incarnation, the Corps contends that the low spot on the Deatons' property is "adjacent" to a "tributary" to navigable waters. See 33 C.F.R. § 328.3(a)(1), (5), (7) (defining the Corps' jurisdiction to include truly navigable waters, non-navigable tributaries and wetlands adjacent to each). This so-called "tributary" is nothing more than a roadside ditch located next to the Deatons' property, which usually holds less than an inch of water and is often entirely dry. (A photograph of this roadside ditch is attached in the appendix at 1a.) The roadside ditch is connected by a culvert to a larger ditch system maintained by a local public drainage association, or "PDA." See Pet. 5. The PDA's ditch system eventually connects to the Wicomico River, which first becomes navigable over eight miles away from the Deatons' property. See *id.*

Despite these tenuous connections, the Fourth Circuit accepted the Corps' contention that the roadside ditch was the sort of "water" that Congress authorized the Corps to regulate. According to the court, the Corps may properly assert federal jurisdiction over "any branch of a tributary system that *eventually flows* into a navigable body of water," Pet. App. 20a (emphasis supplied), including such remote channels as the roadside ditch. Moreover, rather than assess whether Congress specifically authorized the Corps to assert federal jurisdiction over such remote roadside ditches, the Fourth Circuit simply deferred to the Corps' claim of jurisdiction. *Id.* at 20a-22a. According to the court, no independent inquiry into Congress' intent to regulate so far from the navigable waters was necessary. It was enough that the Corps had declared the roadside ditch to be a "tributary."

Id. at 20a (citing *Chevron U.S.A.* v. *Natural Res. Def. Council*, 467 U.S. 837 (1984)).

The Fourth Circuit's decision raises issues of substantial importance. First, the jurisdictional theory it employs is breathtakingly sweeping. Under the Corps' "eventually flows" theory, every ditch and swale in the nation is a federal water, because every ditch and swale "eventually flows" through some series of connections "into a navigable body of water." Pet. App. 20a. This extension of federal civil and criminal authority has enormous implications for countless small businesses, property owners, developers and contractors across the country.

Second, the deference the Fourth Circuit gave the Corps eliminated any check on the Corps' jurisdictional ambitions and left the scope of federal CWA jurisdiction to the unfettered whim of the agency. The Corps' assertion of federal power—which pushes the boundaries of federal authority, encroaches upon the traditional realm of the States and carries the sanction of the criminal law—does not warrant deference. Instead, to protect against arbitrary and unauthorized deprivations of individual liberty, a more searching judicial review is required.

For these reasons, the Fourth Circuit's holding and approach cannot be squared with this Court's decision in *SWANCC*. Just three years ago, this Court held that the Corps' jurisdiction under the CWA is not unlimited and rejected the Corps' claim of jurisdiction over isolated wetlands under the so-called "Migratory Bird Rule." In so holding, this Court declared that Congress' use of the term "'navigable waters'" *limited* the scope of federal CWA jurisdiction. *SWANCC*, 531 U.S. at 172 (quoting 33 U.S.C. § 1344(a)). Moreover, this Court declined to defer to the Corps' broad jurisdictional theories. Instead, this Court demanded a clear statement that Congress itself authorized the Corps' expansive claims. *Id.* at 173-74. The Fourth Circuit ignored this clear statement rule and deferred to the

Corps' efforts to continue (even after *SWANCC*) to assert the broadest possible jurisdiction for itself.

Finally, the Fourth Circuit's decision conflicts with the law of another circuit. In sharp contrast to the "eventually flows" theory set forth in the decision below, the Fifth Circuit has held that federal CWA jurisdiction extends only to waters that are "actually navigable or . . . adjacent to an open body of navigable water." *Rice* v. *Harken Exploration Co.*, 250 F.3d 264, 269 (5th Cir. 2001).[2] The split deepened with the Sixth Circuit's decision in *United States* v. *Rapanos*, 339 F.3d 447 (6th Cir. 2003), *petition for cert. filed*, No. 03-929 (U.S. filed Dec. 22, 2003), which adopted the Fourth Circuit's approach. The split is also entrenched. After the Petition was filed in this case, the Fifth Circuit reaffirmed its holding in *Rice* and expressly rejected the opinions of its sister circuits, including the decision below. See *United States* v. *Needham (In re Needham)*, No. 02-30217, 2003 WL 22953383, at *3 (5th Cir. Dec. 16, 2003) (describing the definition approved in *Deaton* and *Rapanos* as "unsustainable under *SWANCC*"). This Court's intervention is sorely needed to bring uniformity to this important federal regulatory scheme.

I. THE CORPS OF ENGINEERS' SWEEPING THEORY OF FEDERAL JURISDICTION WILL HAVE A SUBSTANTIAL ADVERSE IMPACT ON SMALL BUSINESSES, PROPERTY OWNERS AND CONTRACTORS NATIONWIDE.

The Corps' sweeping jurisdictional theory will affect millions of small businesses, property owners, contractors and developers across the nation. Under the Corps' theory, the Deatons' digging required a federal permit because their property is "adjacent to" a shallow, man-made, roadside ditch, which is ultimately connected and "eventually flows" through a chain of culverts and other ditches to a river eight

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[2] *Rice* involved the Oil Pollution Act of 1990 ("OPA"), which uses the CWA's definition of "navigable waters." *See Rice*, 250 F.3d at 267-68.

miles away. This is an unlimited theory of federal jurisdiction.

As a matter of basic hydrology, water flows downhill; and virtually all of the habitable land in the nation can be linked through some chain of connections to a distant navigable water. In short, the Corps purports to rely on the CWA's authorization of jurisdiction over the "navigable waters" to federalize virtually all ditches, all waters and all wetlands in the nation. Like the Deatons' property, many of these remote channels and "wetlands"[3] have no water in sight and are not recognizable as "waters" at all. (Photographs of remote channels and ditches over which the Corps has asserted jurisdiction are attached at 2a through 4a.[4])

This professed expansion of jurisdiction will subject countless new activities to the Corps' cumbersome permitting process. Under § 404 of the CWA, any person who "discharge[s] dredged or fill material" into a "navigable water" must first obtain a permit from the Corps. 33 U.S.C. § 1344(a). The Corps has defined the "discharge [of] dredged or fill material" extremely broadly, to apply to all sorts of

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[3] The Corps uses a technical process to identify areas containing "wetlands." *See* U.S. Army Corps of Engineers, *Corps of Engineers Wetlands Delineation Manual* (Jan. 1987), *available at* http://www.saj.usace.army.mil/permit/documents/87manual.pdf. "Where wetlands are adjacent to open water"—such as those at issue in *United States* v. *Riverside Bayview Homes, Inc.*, which "actually abut[ted]" a navigable waterway, 474 U.S. 121, 135 (1985)—"they generally constitute the transition to upland." 40 C.F.R. § 230.41(a)(2). Of course, the wetlands at issue in this case are not adjacent to an open body of water.

[4] These photographs were presented with the testimony of Robert J. Pierce, Ph.D., before the Senate Committee on Environment & Public Works. *See Current Regulatory and Legal Status of Federal Jurisdiction of Navigable Waters Under the Clean Water Act, In Light of the Issues Raised by the Supreme Court in Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers, No. 99-1178 (SWANCC): Hearing Before the Senate Comm. on Env't and Pub. Works, Subcomm. on Fisheries, Wildlife and Water*, 108th Cong. (June 10, 2003).

ordinary activities involving the movement of dirt. For example, the Corps generally requires permits for "land-clearing," "ditching" and "earth-moving" by "mechanized earth-moving equipment," absent "project-specific evidence" that no permit is required. 33 C.F.R. § 323.2(d)(2)(i). The Corps has required permits for plowing on agricultural land. See *Borden Ranch P'ship* v. *United States Army Corps of Eng'rs*, 261 F.3d 810 (9th Cir. 2001), *aff'd by an equally divided Court*, 537 U.S. 99 (2002) (per curiam). The Corps has required permits for "sidecasting," or "the deposit of dredged or excavated material from a wetland back into that same wetland." *United States* v. *Deaton*, 209 F.3d 331, 335 (4th Cir. 2000). The Corps has required permits for residential construction impacting an area "about half the size of a ping-pong table." Virginia S. Albrecht & Bernard N. Goode, *Wetland Regulation in the Real World* ix (1994). The Corps has even suggested that it has jurisdiction over "[a]ctivities such as walking, bicycling or driving a vehicle through a wetland," declining only in its "discretion" to exercise the authority it claims to have been delegated. Clean Water Act Regulatory Programs, 58 Fed. Reg. 45,008, 45,020 (Aug. 25, 1993). As the Corps expands its geographic reach to ever smaller ditches and channels and the wetlands adjacent to them, more and more of these ordinary activities will require federal approval.

This federal approval process is complex, rivaling that of any local planning board. The Corps reviews individual dredge-and-fill permit applications for compliance with specific technical guidelines promulgated under § 404(b)(1) of the CWA (the "404(b) Guidelines," codified at 40 C.F.R. Part 230). The Corps also subjects each permit application to a "public interest review." See 33 C.F.R. § 320.4. The Corps considers "all factors" in this plenary review, including such concerns of the general police power as:

> conservation, economics, aesthetics, general environmental concerns, wetlands, historic properties, fish and

> wildlife values, flood hazards, floodplain values, land use, navigation, shore erosion and accretion, recreation, water supply and conservation, water quality, energy needs, safety, food and fiber production, mineral needs, considerations of property ownership and, in general, the needs and welfare of the people.

Id. § 320.4(a)(1). The Corps' "general permit" process—an ostensibly "streamlined" permitting process for smaller and simpler projects—also requires advance notice to the Corps, as well as compliance with detailed requirements set forth in 70 pages of the Federal Register, including such land-use practices as the provision of vegetated buffer zones. See 67 Fed. Reg. 2020 (Jan. 15, 2002). If the Corps rejects an individual or general permit application, the project cannot go forward, regardless of the opinions of state and local authorities. See *SWANCC*, 531 U.S. at 162-65 (project sponsored by 23 suburban Chicago cities and villages and approved by all necessary state and local authorities, including the Cook County Board of Appeals, the Illinois Environmental Protection Agency and the Illinois Department of Conservation, but rejected by the Corps).

The extension of this permitting process to a multitude of new construction and development activities will have a substantial economic impact. According to one study, the average time to prepare a full permit application and pursue the regulatory review process exceeds 788 days, or over two years. See D. Sunding & D. Zilberman, *The Economics of Environmental Regulation by Licensing: An Assessment of Recent Changes to the Wetland Permitting Process*, 42 Nat. Resources J. 59, 76 (2002). The average cost of retaining environmental consultants and preparing and shepherding the application averages over $271,596. *Id.* at 74. Even the general permitting process requires an average of 313 days to complete and costs the applicant nearly $30,000. *Id.* at 74-

76.[5] The Corps' continued expansion of its regulatory jurisdiction will only increase the expense and delay for the regulated public.

Equally disconcerting to *amici* is the increased exposure to civil and criminal liability that results from the decision below. Liability under the CWA's civil enforcement provisions is strict; there is no requirement of negligence, much less of *mens rea*. Thus, the regulatory scheme poses a serious trap for the unwary who are involved in a construction or development project. See, *e.g.*, *United States* v. *Sargent City Water Res. Dist.*, 876 F. Supp. 1081, 1088 (D.N.D. 1992) (civil enforcement action against county, contractor, and engineer for performing or having "responsibility for or control over" drainage repair project); *United States* v. *Board of Trs.*, 531 F. Supp. 267, 274 (S.D. Fla. 1981) (civil enforcement action against community college board of trustees and contractor for stormwater drainage project; civil liability is "strict"); *United States* v. *Weisman*, 489 F. Supp. 1331, 1333-34 (M.D. Fla. 1980) (civil enforcement action against property owner and engineer for construction of road to property owner's home). Landowners and contractors who discharge dredged or fill material without a permit may incur substantial civil penalties, including civil fines of up to $27,500 per violation per day.

The CWA's criminal penalties are even more severe. Negligent violations of the Act carry prison terms of up to one year. See 33 U.S.C. § 1319(c)(1). Penalties increase for

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[5] On the Corps' side of the ledger, the demands posed by the permitting process have increased each year. In fiscal year 1994, the Corps reported receiving over 48,000 applications. *See* Sunding & Zilberman, *supra*, at 76. In fiscal year 2002, the Corps reported issuing 85,445 permit decisions. *See* U.S. Army Corps of Eng'rs, *Regulatory Program Statistics—FY* 2002, at 1, *available at* http://www.usace.army.mil/inet/functions/cw/cecwo/reg/2002webcharts.pdf (last visited Jan. 2, 2004). The substantial increase in the number of permit applications has directly contributed to the Corps' increasing backlog and delay.

multiple negligent violations, see *id.*, and for "[k]nowing" violations, to include fines of up to $100,000 per day and six years' imprisonment. See *id.* § 1319(c)(2). Moreover, these *mens rea* requirements provide only limited protection, because lower courts have generally not required that a person know his conduct is illegal. Instead, "the government need only prove the defendant's knowledge of the [operative] facts." *United States* v. *Wilson*, 133 F.3d 251, 264 (4th Cir. 1997). The threat of such criminal prosecution is real. Indeed, the government has prosecuted individuals for engaging in construction projects in remote areas comparable to the Deatons' property. See, *e.g.*, *Rapanos*, 339 F.3d at 454 (affirming such a criminal conviction).

In extending these civil and criminal provisions to a broad expanse of the nation's geography, the decision below increases the hazards of everyday decisionmaking for business owners, property owners and contractors. As a general matter, these are ordinary people "using standard equipment to engage in a broad range of ordinary industrial and commercial activities." *Hanousek* v. *United States*, 528 U.S. 1102, 1103 (2000) (Thomas, J., with O'Connor, J., dissenting from denial of certiorari). The farther away from truly navigable waters the Corps asserts jurisdiction, the less obvious the applicability of the CWA will be to a layperson. The decision below thus makes it far more likely that a lay landowner or contractor will unwittingly "fill" a "navigable water" and be exposed to liability under the Act.

All of these adverse effects would have been avoided had the Fourth Circuit followed this Court's decision in *SWANCC*. In *SWANCC*, this Court stated that "[t]he term 'navigable' has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made." *SWANCC*, 531 U.S. at 172. This Court therefore held that the CWA grants jurisdiction only over truly navigable waters and

other, limited areas that are "'inseparably bound up with'" those truly navigable waters. *Id.* at 167 (quoting *Riverside Bayview Homes*, 474 U.S. at 134). As the Fifth Circuit held in *Needham*, the Corps' definition and the Deatons' remote roadside ditch do not meet this standard.

II. THE FOURTH CIRCUIT'S DEFERENCE TO THE CORPS OF ENGINEERS IGNORED IMPORTANT JUDICIAL SAFEGUARDS FOR INDIVIDUAL LIBERTY.

Amici recognize that Congress may choose to impose burdens on the public, so long as it acts within its constitutional authority. The question in this case is whether Congress even remotely authorized these burdens. Applying a "one-two combination" of *Chevron* and *Seminole Rock*[6] deference, the Fourth Circuit simply accepted the Corps' theory of its own jurisdiction. In so doing, the Fourth Circuit ignored key safeguards that this Court has set forth to prevent federal administrative agencies from arrogating to themselves the power to encroach arbitrarily on individual liberty.

First, "[w]here an administrative interpretation of a statute invokes the outer limits of Congress' power," this Court will search the statute for "a clear indication that Congress intended that result." *SWANCC*, 531 U.S. at 172. "This requirement stems from [a] prudential desire not to needlessly reach constitutional issues and [the] assumption that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority." *Id.* at 172-73. If no clear statement exists, the statute must be narrowly construed. See *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988).

The Corps' assertion of so-called "tributaries" jurisdiction to the tip of remote and insignificant ditches and channels and

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[6] *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410 (1945).

over wetlands "adjacent" thereto pushes the boundaries of Congress' power over the channels of commerce to and beyond its constitutional limits and is not authorized by any clear congressional statement. The Fourth Circuit's decision, although holding otherwise, only confirms that conclusion. Advancing a theory not proposed by any party, the Fourth Circuit first observed that Congress has the power to protect the channels of commerce from "'injurious uses.'" Pet. App. 11a (quoting *Caminetti* v. *United States*, 242 U.S. 470, 491 (1917) (upholding the Mann Act's ban on *interstate* transportation of females for an "immoral purpose")). The court then held that numerous, trivial, intrastate activities such as the Deatons' digging could be aggregated to provide justification for widespread federal regulation. *Id.* at 13a (citing *Wickard* v. *Fillburn*, 317 U.S. 111 (1942)). This search for a supporting constitutional doctrine and ultimate combination of the inapposite holding of *Caminetti* with the aggregation doctrine of *Wickard*—"perhaps the most far reaching example of Commerce Clause authority over intrastate activity" *United States* v. *Lopez*, 514 U.S. 549, 560 (1995)—shows that the Corps' interpretation at the very least "raise[s] serious constitutional problems" and requires clear authorization from Congress. *SWANCC*, 531 U.S. at 173.

Second, the need for a clear statement of congressional authorization "is heightened where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power." *Id.* The "fundamental purpose" of our system of federalism is to secure individual liberty. *New York* v. *United States*, 505 U.S. 144, 181 (1992); see also *Lopez*, 514 U.S. at 576 (Kennedy, J., concurring) ("[I]t was the insight of the Framers that freedom was enhanced by the creation of two governments, not one."); *Gregory* v. *Ashcroft*, 501 U.S. 452, 459 (1991) ("In the tension between federal and state power lies the promise of liberty."). Having experienced first-hand the capacity for the accretion of power in an unchecked

sovereign, the Framers believed that "a healthy balance of power between the States and the Federal Government [would] reduce the risk of tyranny and abuse from either front." *Id.* at 458. This Court has therefore viewed with caution agency attempts to secure new and far-reaching federal powers in traditional areas of state control without clear congressional authorization. See, *e.g.*, *SWANCC*, 531 U.S. at 171-72.

The "dredge-and-fill" permitting program at issue in this case regulates land and water use; and "[t]he regulation of land use is traditionally a function performed by local governments." *Lake Country Estates, Inc.* v. *Tahoe Reg'l Planning Agency*, 440 U.S. 391, 402 (1979). This Court has observed time and again that the areas of zoning and land and water use fall well within traditional state authority. See, *e.g.*, *Hess* v. *Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 44 (1994) ("[R]egulation of land use [is] a function traditionally performed by local governments."); *FERC* v. *Mississippi*, 456 U.S. 742, 768 n.30 (1982) ("[R]egulation of land use is perhaps the quintessential state activity."); *Warth* v. *Seldin*, 422 U.S. 490, 508 n.18 (1975) ("[Z]oning laws and their provisions . . . are peculiarly within the province of state and local legislative authorities."). For this reason, this Court held in *SWANCC* that the Corps' interpretation of the very program at issue in this case "imping[ed]" upon "the States' traditional and primary power over land and water use." *SWANCC*, 531 U.S. at 174. Congress did not authorize the Corps to override this traditional balance. Instead, "Congress chose to 'recognize, preserve, and protect the primary responsibilities and rights of States to . . . plan the development and use . . . of land and water resources.'" *Id.* at 166-67 (quoting 33 U.S.C. § 1251(b)). Thus, if Congress stated anything plainly in the CWA, it was that the Corps should respect state and local control, not impose federal regulation to and beyond Congress' constitutional power.

There is a square conflict in the circuits on this point that only this Court can resolve. In sharp contrast to the Fourth Circuit's extensive deference, the Fifth Circuit declined to defer to such interpretations of geographic jurisdiction, because "the regulatory definition, if applied [as the agency suggested], would push the OPA to the outer limits of the Commerce Clause and raise serious constitutional questions . . . . [and because] *Rice* and *SWANCC* have rejected such an expansive reading of the OPA and CWA respectively." *Needham*, 2003 WL 22953383, at *5 n.8.

Wholesale deference to the Corps' interpretation of the CWA was also inappropriate because the statute carries criminal penalties. Under the rule of lenity, "when there are two rational readings of a criminal statute, one harsher than the other, [a court should] choose the harsher only when Congress has spoken in clear and definite language." *McNally* v. *United States*, 483 U.S. 350, 359-60 (1987). This ensures that "'fair warning [is] given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed.'" *United States* v. *Bass*, 404 U.S. 336, 348 (1971). In addition, "because of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community," this rule ensures that "*legislatures* . . . define criminal activity." *Id.* (emphasis supplied).

Congress never anticipated or intended that the CWA would be applied to make potential criminals out of ordinary landowners like the Deatons. And nowhere in the CWA is there a clear statement authorizing the regulation of roadside ditches under the rubric of "tributaries." Even the Fourth Circuit concluded that one "cannot tell from the Act the extent to which nonnavigable tributaries are covered" at all. Pet. App. 17a. The rule of lenity therefore required the court to construe the Act narrowly, to avoid turning countless developers and contractors into inadvertent criminals. Cf. *Hanousek*, 528 U.S. at 1103 (Thomas, J. dissenting from

denial of certiorari) ("[W]e should be hesitant to expose countless numbers of construction workers and contractors to heightened criminal liability for using ordinary devices to engage in normal industrial operations.").

Finally, the Corps' claim of jurisdiction over non-navigable roadside ditches simply lacks the "'thoroughness,'" "'validity'" and "consistency" required to merit judicial deference. *United States* v. *Mead Corp.*, 533 U.S. 218, 228 (2001). Indeed, the Corps' current jurisdictional theory arose merely as a litigating position over a decade after the Deatons first moved earth on their property. Before the advancement of its current theory, the Corps' published pronouncements were at best ambiguous, and appeared to disavow entirely CWA jurisdiction over ditches.[7]

Jurists have properly expressed discomfort with the Corps' mode of decisionmaking, with regard to federal jurisdiction generally and ditches specifically. A panel of the D.C. Circuit reviewing the Corps' decade-long struggle to assert jurisdiction over "incidental fallback," (the dirt that dribbles

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[7] The Corps' earliest regulations identifying drainage ditches "excluded" them from jurisdiction. *See* Interim Final Rules for Regulatory Programs of the Corps of Engineers, 40 Fed. Reg. 31,320, 31,321 (July 25, 1975). The Corps' 1977 regulations expressly stated that "manmade nontidal drainage and irrigation ditches excavated on dry land are not considered waters of the United States." Final Rule for Regulatory Programs of the Corps of Engineers, 42 Fed. Reg. 37,122, 37,144 (July 19, 1977). That statement disappeared from the regulations in 1982, *see* Interim Final Rules for Regulatory Programs of the Corps of Engineers, 47 Fed. Reg. 31,794, 31,811 (July 22, 1982), but reappeared in the preamble to the Corps' 1986 regulations with an ambiguous qualifier. *See* Final Rule for Regulatory Programs of the Corps of Engineers, 51 Fed. Reg. 41,206, 41,217 (Nov. 13, 1986) (stating that "Non-tidal drainage and irrigation ditches excavated on dry land" are "generally . . . not consider[ed] . . . to be 'Waters of the United States'"). In 2000, 10 years after the Deatons first attempted to build on their property, the Corps continued to disavow jurisdiction over "ditches constructed entirely in upland areas." 65 Fed. Reg. 12,818, 12,823-24 (Mar. 9, 2000).

from the side of a shovel as it is lifted out of the ground), declared that the "overriding purpose" of the Corps' regulation "appear[ed] to be to expand the Corps's permitting authority." *National Mining Ass'n* v. *United States Army Corps of Eng'rs*, 145 F.3d 1399, 1405 (D.C. Cir. 1998). Rejecting the Corps' unilateral assertion of jurisdiction over a type of agricultural plowing, the Ninth Circuit's Judge Gould described the Corps' radical expansion of authority without explicit congressional authorization as "an agency power too unbounded." *Borden Ranch P'ship*, 261 F.3d at 821 (Gould, J., dissenting); see also *United States* v. *Newdunn Assocs.*, 195 F. Supp. 2d 751, 767 (E.D. Va. 2002) ("While expanding its authority through new regulations may be more expedient than convincing Congress through properly enacted legislation, it is not permissible for the Corps to take a shortcut by continually redefining regulatory terminology and therefore its own jurisdiction."), *rev'd*, 344 F.3d 407 (4th Cir. 2003), *petition for cert. filed*, 72 U.S.L.W. 3310 (U.S. Oct. 27, 2003) (No. 03-637).

Even after this Court's decision in *SWANCC*, the Corps' overriding focus has been to seek the broadest possible geographic jurisdiction without regard to Congress' actual intent. In the weeks after the *SWANCC* decision issued, the Corps and EPA issued a joint memorandum to field personnel describing the Court's holding as "limited" and asserting authority "to assert CWA jurisdiction over, *inter alia*, all of the traditional navigable waters, all interstate waters, and all tributaries to navigable or interstate waters, *upstream to the highest reaches of the tributary systems*, and over all wetlands adjacent to any and all of those waters." Memorandum from Gary S. Guzy & Robert M. Andersen, Supreme Court Ruling Concerning CWA Jurisdiction Over Isolated Waters 6-7 (Jan. 19, 2001) (emphasis supplied), *available at* http://www.epa.gov/owow/wetlands/swancc-ogc.pdf. On January 15, 2003, two years after this Court's decision rejecting the foundation for the Corps' jurisdictional regulations, the agency finally

issued an Advance Notice of Proposed Rulemaking "request[ing] public input on issues associated with the definition of 'waters of the United States' and also solicit[ing] information . . . on the implications of the *SWANCC* decision for jurisdictional decisions under the CWA." 68 Fed. Reg. 1991, 1991 (Jan. 15, 2003) (the "ANPRM"). The ANPRM announced the Corps' and EPA's intent to "develop proposed regulations that will further the public interest by clarifying what waters are subject to CWA jurisdiction." *Id.* But on December 16, 2003, the same day that the Fifth Circuit issued its decision in *Needham*, the Corps and EPA "announced that they would not issue a new rule on federal regulatory jurisdiction," even "over *isolated wetlands*," and abandoned the rulemaking altogether. Press Release, EPA, EPA & Army Corps Issue Wetlands Decision (Dec. 16, 2003) (emphasis supplied). As a result, rather than give this issue the careful, public consideration it warrants, the agencies apparently will continue their efforts to expand their jurisdiction through *ad hoc* guidance memoranda and case-by-case field application, constrained only by the supervision of the courts. In light of the hands-off approach embraced by the Court of Appeals in this case, only review by this Court will ensure that judicial supervision of the Corps is meaningful.

III. THE COURT SHOULD GRANT THE PETITION TO RESOLVE CIRCUIT SPLITS REGARDING THE SCOPE OF FEDERAL JURISDICTION UNDER THE CLEAN WATER ACT AND THE APPLICATION OF *CHEVRON* DEFERENCE TO IMPLEMENTING AGENCIES.

The Fourth Circuit's decision is irreconcilable with two decisions from the Fifth Circuit. The Fourth Circuit below deferred to the Corps' claim of jurisdiction over "any branch of a tributary system that eventually flows into a navigable body of water," including "a roadside ditch." Pet. App. 2a, 20a. The Sixth Circuit adopted this approach and aggravated the split. See *Rapanos*, 339 F.3d at 452-53.

In the Fifth Circuit, by contrast, "a body of water is subject to regulation . . . if the body of water is actually navigable or is adjacent to an open body of navigable water." *Rice*, 250 F.3d at 269. In *Rice*, the Fifth Circuit rejected jurisdiction over an "intermittent stream[]," because "there [wa]s nothing in the record that could convince a reasonable trier of fact that [the stream was] sufficiently linked to an open body of navigable water as to qualify for protection." *Id.* at 270-71. The Fifth Circuit recently reaffirmed this standard and expressly rejected both the scope of jurisdiction and the deference afforded the agency in the Fourth Circuit's decision below. See *Needham*, 2003 WL 22953383, at *3 & *5 n.8 (describing the definition approved in *Deaton* and *Rapanos* as "unsustainable under *SWANCC*" and holding that "the regulation is not entitled to *Chevron* deference"). According to the Fifth Circuit:

> The CWA and the [Oil Pollution Act] are not so broad as to permit the federal government to impose regulations over "tributaries" that are neither themselves navigable nor truly adjacent to navigable waters. *See Rice*, 250 F.3d at 269. Consequently, in this circuit the United States may not simply impose regulations over puddles, sewers, *roadside ditches* and the like . . . .

Id. at *3 (footnote omitted and emphasis supplied). See also *id.* at *5 n.12 ("[I]ncluding all 'tributaries' as 'navigable waters' would negate *Rice's* adjacency requirement, and extend the OPA beyond the limits set forth in *SWANCC*."). The positions of the Fourth and Fifth Circuits regarding the scope of geographic jurisdiction under the CWA and the deference due the implementing agencies cannot be reconciled without the intervention of this Court.

CONCLUSION

For the foregoing reasons and those stated in the Petition, the Petition for Certiorari should be granted.

Respectfully submitted,

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APPENDIX

Potomac, Maryland

Nogales, Arizona

4a

California

Supreme Court, U.S.
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(8)

No. 03-701

IN THE
SUPREME COURT OF THE UNITED STATES

JAMES S. and REBECCA DEATON,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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Brief of Amici Curiae Nationwide Public Projects Coalition, West Valley Water District of San Bernadino, CA, Metropolitan Denver Water Authority of Littleton, CO, Cobb County-Marietta, GA Water Authority and Consolidated Mutual Water Company of Colorado in Support of Petitioners

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QUESTIONS PRESENTED

A three-foot wide roadside drainage ditch runs alongside the property of James and Rebecca Deaton in rural Wicomico County, Maryland. The roadside ditch was built and is maintained by the county roads department and connects to a ditch system operated by a public association established under state law to address local drainage problems. The Deatons dug a ditch on their property and, in so doing, disturbed an area the United States Army Corps of Engineers considers a wetland.

There is no showing that common dirt—the pollutant at issue—left the Deatons' property, flowed into the roadside ditch, or reached any truly navigable waters.

The questions presented are:

1. Are the roadside ditch and the wetland next to it "navigable waters" under the Clean Water Act?

2. Where activity in a wetland has not degraded either a nonnavigable roadside ditch next to the wetland or a downstream traditional navigable water, does Congress's commerce power over navigation allow federal regulation of that wetland or that roadside ditch?

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The Nationwide Public Projects Coalition, headquartered in Colorado, with Coalition members the West Valley Water District of California, the Metropolitan Denver Water Authority, the Cobb County-Marietta Water Authority of Georgia and The Consolidated Mutual Water Company of Colorado, as amici curiae, respectfully submit this brief in support of Petitioners James and Rebecca Deaton.[1]

INTERESTS OF THE AMICI CURIAE

The Amici are cities, water and wastewater districts, and private entities that serve public agencies that provide essential services to the public. Amici believe that the current unsettled status of the jurisdictional reach of the Clean Water Act ("CWA"), and the fact that the responsible agencies have declined to cure this uncertainty, requires the Court to step in and resolve these outstanding questions. The current lack of clarity has profound implications for the ability of Amici's members and other participants to provide public services in a timely and cost efficient manner.

The Nationwide Public Projects Coalition ("NPPC") is a not-for-profit association that is made up of regional and local government agencies that are involved in municipal water supply, flood control, agricultural irrigation, and wastewater and stormwater management. These agencies represent some fifteen million constituents, extending from Connecticut to California and from Alaska to Georgia. NPPC's goal is to represent the public's interest in ensuring that vital public infrastructure services are provided

[1] The parties have consented to filing of this brief. The Amici have filed letters of consent with the Clerk. Pursuant to this Court's Rule 37.6, Amici state that no counsel for any party in this case authored this brief in whole or in part, and no person or entity other than the Amici and their counsel has made a monetary contribution to the preparation and submission of this brief.

in a safe, timely, affordable, and environmentally-responsible fashion. Consisting predominately of public agencies and firms that provide services to the public sector, NPPC's members must ensure that a fair balance is achieved between environmental values and the essential needs of the public.

The West Valley Water District of San Bernadino, California ("WVWD") is an independent special water district that serves a population of approximately 55,000 citizens.

The Metropolitan Denver Water Authority of Littleton, Colorado ("MDWA") is a political subdivision and public corporation of the State of Colorado. MDWA is made up of twenty cities and special districts that provide municipal water and/or wastewater services for the Metropolitan Denver area and serve more than 1.5 million persons. MDWA's member agencies serve some of the fastest-growing counties in the nation.

The Cobb County-Marietta Water Authority ("CCMWA") is a political subdivision of the State of Georgia that supplies water to more than 700,000 people in the rapidly growing Metro-Atlanta area.

The Consolidated Mutual Water Company ("CMWC") is a mutually owned, and serves an estimated population of 83,000 people in Jefferson County, Colorado in the Western region of Metropolitan Denver.

This case has a profound impact on the Amici, and on the public that they serve. The U.S. Army Corps of Engineers' ("Corps") inconsistent assertion of CWA regulatory jurisdiction even over de minimus ditches, swales, intermittent streams and drainages, dry washes and many

other remote, ephemerally wet areas alleged to be connected by the most tenuous of means to larger bodies of water affects public and private projects throughout the Nation, and contributes little or nothing to the protection of the environment.

This inconsistency is compounded by the clear split among federal circuits over the proper scope and interpretation of the Supreme Court's 2001 decision in Solid Waste Agency v. United States Army Corps of Engineers ("SWANCC"), 531 U.S. 159 (2001). Several regional offices of the United States Environmental Protection Agency ("EPA") and divisions of the Corps overlap two or more circuits that have arrived at opposing conclusions regarding CWA jurisdiction in the wake of SWANCC. Therefore, the practical effect of the split is to make it incumbent upon individual regulators to evaluate competing legal standards depending upon where a particular project or parcel happens to lie.

The reigning confusion over the proper jurisdictional reach of the CWA in the wake of SWANCC has a chilling effect on public projects by allowing the Corps and the EPA[2] to override carefully considered decisions and investments of state and local governments that are intended to meet vital

[2] A 1979 Opinion of the Attorney General determined that EPA has the ultimate authority for determining the extent of CWA jurisdiction. See 43 Op. Att'y Gen. 15 (1979). The Corps and EPA, however, entered into a memorandum of agreement in 1989 that accords the Corps primary authority to determine the scope of geographical jurisdiction under the CWA. See Margaret N. Strand, Wetlands Deskbook, (2d ed. 1997) (Mem. of Agreement Between the Department of the Army and the Environmental Protection Agency Concerning the Determination of Geographic jurisdiction of the Section 404 Program and the Application of the Exemptions Under Section 404(f) of the Clean Water Act (Jan. 19, 1989)).

public needs, including lifesaving infrastructure. As it is, in the absence of any clear guidance, public agencies such as the Amici are often at the "whim" of a particular regulator as to the jurisdictional test to be employed. The "real world" impacts for public projects are profound.

For example, stormwater management agencies generally require access to wetlands and streams and other areas that are seasonally wet due to collection of rainwater. Depending on the jurisdiction, these agencies may require authorization from the Corps to conduct basic, but important, maintenance functions such as cleaning debris basins and clearing vegetation and other obstructions that choke flood control channels. Such activities are critical to maintaining the maximum capacity and proper functioning of the flood control systems during major flood events. These activities are especially critical for NPPC members in Southern California that must rapidly clean out accumulated sediment from flood control channels to prevent flood damage and loss of life. Many of these areas have water during storms but are otherwise dry. In the wake of SWANCC, and in the face of inaction by the U.S. Environmental Protection Agency ("EPA") and the Corps, the Amici have found it difficult if not impossible to predict where and when CWA jurisdiction will be imposed.

The Fourth Circuit's holding in United States v. Deaton, 332 F.3d 698 (4th Cir. 2003), is representative of a trend among some circuits to limit the SWANCC decision to the overturning of a single EPA regulation, the "Migratory Bird Rule." These courts sharply reserve SWANCC to its facts, while propagating a broadly inclusive test (the so-called "migratory molecule" test) for federal jurisdiction under the Clean Water Act, 33 U.S.C. §§ 1251 et seq., ("CWA") (2003). Such a test would, in fact, include the very

isolated wetlands found to be outside the jurisdiction of the CWA in SWANCC.

Amici believe that this Court did not intend for SWANCC to be applied in such a limited fashion. In our view, the court performed a careful and accurate review of the grounds upon which the CWA jurisdiction is based. Amici believe that the reading of SWANCC represented by the Fifth Circuit's recent holding in In re Needham, -- F.3d--, 2003 WL 22953383 (5th Cir. Dec. 16, 2003) is an accurate reading of the Court's concern in SWANCC with the violation of traditional local and state prerogatives.[3]

Thus, clarification of the current confusion by the Court is essential to provide the Amici's diverse membership with minimal levels of certainty and predictability in the processes necessary for design and implementation of public works projects. The Amici's members invest countless hours and hundreds of millions of tax dollars planning, assuring financing, preparing for, and constructing public service projects of significant, long-term cost. If projects that impact only remote and ephemeral waters (such as the drainage ditches at stake in Deaton) are subject to the complex CWA 404 permitting process, countless hours and millions of tax dollars for vital public works projects could be needlessly sacrificed. The long-range consequences for the Nation may include significant decreases in not only the quantity and quality of public works projects, but also the

[3] Indeed, SWANCC made it absolutely clear that intrusion of federal jurisdiction into matters traditionally reserved to state and local governments (such as land use) cannot be permitted, absent a clear statement of Congressional intent not found in the CWA. SWANCC, 531 U.S. at 172-173. Disregard of this clear holding is, in Amici's view, among the primary flaws in the reasoning of the Fourth Circuit in Deaton.

ability to timely deliver public services necessary to protect public health and welfare.

SUMMARY OF ARGUMENT

1. The limited reading of the SWANCC decision embodied by Deaton and shared by decisions in the Sixth, Seventh and Ninth Circuits stands in stark contrast to the analysis of the Fifth Circuit in Needham and other cases. The limited reading in Deaton grants the federal government an overbroad jurisdictional reach, and disregards significant aspects of the SWANCC decision.

2. The geographic reach of many of the EPA and the Corps's regional offices include states from circuits on both sides of the split over SWANCC. This forces the regulators to determine which test they will apply to which projects based upon location and the current state of case law in a given circuit. Individual regulators thus decide the reach of Congress's Clean Water Act authority.

3. The broad jurisdictional reach granted by Deaton will make it very difficult for Amici to utilize the "fast track" Nationwide Permit Program for the public activities they perform. Forcing such critical activities into the individual permit program will greatly increase costs of delivering important public services such as water supply and flood control.

4. The Corps and the EPA, as responsible agencies, have stated that they will not issue new regulations to resolve this uncertainty, or recognize the new limitations upon their authority represented by SWANCC. Action by the Supreme Court is thus the only means by which this confusion can be resolved, and the holding in SWANCC be given its intended effect.

ARGUMENT

I. The Split Between the Circuits is Manifest

In the wake of the Supreme Court's decision in SWANCC, courts have scrambled to re-evaluate the scope and reach of the government's regulatory authority over "navigable waters" pursuant to the CWA. The split in interpretation among the courts wrestling with SWANCC was deep and instantaneous. In the three years since the high Court ruled, two diametrically opposed, fully articulated interpretations have emerged among the federal courts.

Courts in the Ninth, Fourth, Sixth and Seventh Circuits have interpreted the decision as a limited holding of no significant jurisdictional import beyond the invalidation of the controversial 1986 regulation allowing the Corps to assert jurisdiction over isolated wetlands based on their use by migratory birds (the "migratory bird rule"). Final Rule for Regulatory Programs of the Corps of Engineers, 51 Fed. Reg. 41,208, 41,217 (Nov. 13, 1986). This group includes the Fourth Circuit's decision in Deaton, at issue here.

In Deaton, the Fourth Circuit upheld the Corps's assertion of jurisdiction over drainage ditches, tributaries of all description, and isolated wetlands that have any type of surface water connection to regulated "navigable waters," no matter how attenuated or intermittent. The court in Deaton gave significant deference to the Corps's expansive definition of "tributary," which asserts jurisdiction even over a roadside ditch with only a tenuous link to a navigable water is jurisdictional, even in the absence of evidence that water from the ditch actually reaches the navigable water. The construction of "tributary" jurisdiction in Deaton is substantially similar to, and indeed is derived from, that found in United States. v. Rueth Development Co., 189 F.

Supp. 2d 874, 877 (N.D. Ind. 2001) (vacated by application of consent decree), aff'd., 335 F.3d 598 (7th Cir.), cert. denied, 72 U.S.L.W. 3282 (2003).

In the Rueth case, the District Court initially ruled that if "a molecule" of water from the disputed wetland eventually intermingles with the molecules of a navigable water, the Corps has jurisdiction: "A drop of rainwater landing in the Site is certain to intermingle with water from the Little Calumet River . . . the Site, therefore, has the 'significant nexus' to a navigable waterway [required by SWANCC]." Id. This "migratory molecule" theory is the most extreme and aggressive construction of the Corps's authority yet acknowledged by a post-SWANCC court, and it is this construction which was asserted by the Corps and upheld by the Fourth Circuit in Deaton.[4]

Courts arriving at this conclusion are, quite simply, ignoring the clear import of the SWANCC decision. Confronted with the limitations clearly set forth in SWANCC, they have simply constructed and applied an even more inclusive standard of adjacency and tributary jurisdiction. However, common sense must prevail here. It is common knowledge that the natural water system in the United States is not rigidly separated by physical boundaries. Justice Stevens, dissenting in SWANCC, noted that most wetlands designated as "isolated" in fact have some degree of hydrological connection to the surrounding water system. SWANCC, 531 U.S. at 176, n.2. However, if a single molecule is enough to create jurisdiction, then the Corps has jurisdiction over practically every drop of water anywhere in

[4] In Deaton, the Fourth Circuit upheld the Maryland District Court's Order denying the Deatons' Motion to Reconsider. Deaton, 332 F.3d at 714. In that Order, the district court cites Rueth for the single-molecule test. United States v. Deaton, No. MJG 95-2140, slip op. at 17 (D. Md. Jan. 28, 2002).

the nation, unless that drop of water is caught in a jar as rainfall from the sky. Under this reading, even the waters at issue in SWANCC would still be jurisdictional.

In contrast, the Fifth Circuit recently reaffirmed its own, more far-reaching reading of SWANCC in the case of Needham. In Needham, the Fifth Circuit determined that SWANCC restricted the authority of the Corps and the EPA over waters and wetlands that are a significant distance from traditionally navigable waters.[5]

The Needham decision reaffirmed the Fifth Circuit's decision in Rice v. Harken Exploration Co., 250 F.3d 264 (5th Cir. 2001), and argued strongly for a broad construction of the reach of the SWANCC decision. In Harken, the owner of the surface rights to a tract of land utilized for oil exploration and drilling filed suit under the Oil Protection Act ("OPA") against the drilling company for the accumulated damage to the soil and groundwater resulting from many small-scale discharges of oil and other pollutants onto the soil, and eventually into Big Creek, a small seasonal creek. Big Creek was variously reported to be "seasonal," "intermittent," and occasionally underground (discharges occurred on land "that only infrequently carried running water").

The plaintiffs argued, and the court agreed, that Congress intended for "navigable waters" to have the same meaning under the OPA as under the CWA but that in light of SWANCC, "a body of water is protected under the Act only if it is actually navigable or is adjacent to an open body of navigable water." Id. at 270. Continuing its OPA analysis

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[5] That is, "navigable-in-fact," as developed by the Daniel Ball line of cases: Daniel Ball, 77 U.S. (10 Wall.) 557 (1870); Economy Light & Power Co. v. United States, 256 U.S. 113 (1921); United States v. Appalachian Elec. Power Co., 311 U.S. 377 (1940).

in the context of the CWA definition, the court concluded that neither the groundwater nor the non-navigable creek at issue were protected by the CWA (and, therefore, fell outside the OPA as well). The court also declined to extend the coverage of the CWA to a discharge on dry land that seeps into groundwater, which in turn seeps into a navigable water.

The Fifth Circuit's return to this topic in Needham reconfirmed the position that SWANCC was a more meaningful curtailment of Corps jurisdiction than the limited cases admit. It is here that the split is most obvious, as the Fifth Circuit in Needham took the Fourth Circuit specifically to task for its decision in Deaton:

> According to the government, the definition [of "navigable waters" found in 40 C.F.R. § 300.5 (2003)] covers all waters, excluding groundwater, that have any hydrological connection with "navigable water." At least two courts appear to have agreed with this expansive interpretation. [citing Deaton and United States v. Rapanos, 339 F.3d 447, 449 (6th Cir. 2003)].
>
> In our view, this definition is unsustainable under SWANCC. The CWA and the OPA are not so broad as to permit the federal government to impose regulations over "tributaries" that are neither themselves navigable nor truly adjacent to navigable waters. *Consequently, in this Circuit the United States may not simply impose regulations over puddles, sewers, roadside ditches and the like; under SWANCC a body of water is subject to regulation if the body of water is actually navigable or adjacent to an open body of navigable water.*

Needham, 2003 WL 22953383, at *3 (emphasis added). The Fifth Circuit clearly has staked out a position in direct opposition to that defined in the Fourth.

While the Fifth is at this time the only Circuit to adopt this position, the District Court of New Jersey in FD & P Enterprises, Inc. v. United States Army Corps of Engineers, 239 F. Supp. 2d 509 (D.N.J. 2003), ruled in similar fashion that the decision in SWANCC had repercussions beyond the elimination of a single regulation. Rejecting the "migratory molecule" test, the district court required the Corps to show evidence of "substantial injurious impact" to a navigable water, thus establishing a "significant nexus" between the regulated site and a "navigable" water. Id. at 517. The FD&P court recognized that this was not an unanimous reading of SWANCC, noting that "[c]ourts interpreting the scope of Solid Waste have essentially split into two camps" on this question. Id. at 513.[6]

In our view, the rationale most recently articulated by Needham, Rice, and FD&P reflects the most accurate and objective interpretation of the SWANCC decision, and should be adopted by this Court.

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[6] Other courts throughout the country have recognized this split. Carabell v. U.S. Army Corps of Eng'rs, 257 F. Supp. 2d 917 (E.D. Mich. 2003); N.C. Shellfish Growers Ass'n v. Holly Ridge Assocs., LLC, 278 F. Supp. 2d 654 (E.D.N.C. 2003).

II. The Public Interest is Damaged by This Continuing Uncertainty.

The split between the circuits has created an untenable situation. Both the regulators and the regulated are forced to make plans and perform their duties based upon estimates and guesswork regarding what the relevant jurisdictional standard is, in a shifting and confusing legal landscape.

A. Due to the Overlap of EPA Districts With Federal Circuits, the Current Split in the Circuits Forces Regulators to Apply Disparate Standards for Different Projects Within their Authority.

As noted above, the Attorney General has determined that the EPA is ultimately responsible for jurisdictional determinations ("JDs") under the CWA, but, in practice, EPA relies upon the Corps as the primary agency in most cases for JDs. See note 2, supra. Thus, the current split in authority has at least one very practical consequence: regulators in Corps and EPA regional and district offices must be prepared to apply divergent standards to the subjects of their jurisdiction, depending on where within the region the site is located.

To take just one example, this chart illustrates the quandary of the regulators and regulated in EPA Region Four:[7]

STATE	GOVERNING CIRCUIT	GOVERNING DECISION
Alabama. Florida, Georgia	Eleventh	n/a
Kentucky, Tennessee	Sixth	Rapanos
Mississippi	Fifth	Harken / Needham
North Carolina, South Carolina	Fourth	Deaton

Mississippi lies within the Fifth Judicial Circuit, and thus must be governed by the limited jurisdiction correctly described in the Harken and Needham decisions. North and South Carolina both lie within the Fourth Circuit, and thus are subject to the more far-reaching jurisdictional grant represented by the Deaton case. Activities in Tennessee and Kentucky must be evaluated by the standards of the Sixth Circuit's decision in Rapanos, which derives largely from Deaton. Rapanos, 339 F.3d at 452. Alabama, Florida, and Georgia make up the Eleventh Circuit, which has yet to specifically address the SWANCC decision.[8]

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[7] See Standard Administrative Regions of States and Corresponding Coast Guard Districts and EPA Regions, 33 C.F.R. Pt. 153 (2003), Subpt. B, Tbl. 2 (EPA Regions); 28 U.S.C.A. § 41 (2003) (Federal circuits).

[8] Further confusion reigns in EPA Region Six, which serves Louisiana, Arkansas, Oklahoma, New Mexico, Texas, as well as some Indian lands. Louisiana and Texas lie within the Fifth Judicial Circuit, and thus must also be governed by Harken and Needham. However, no district or circuit courts in the Tenth (New Mexico) or the Eighth (Arkansas) Circuits have specifically addressed the SWANCC decision.

This confusion is exacerbated by the complex organizational structure of the Corps. The Mississippi Valley Division of the Corps covers the entire length of the Mississippi, from Minnesota to Louisiana, and includes six individual Corps Districts.[9] As it wanders to the Gulf, the Mississippi Valley Division encompasses portions of the Eighth, Seventh, Sixth, and Fifth Federal Circuits:[10]

STATE	GOVERNING CIRCUIT	GOVERNING DECISION
Minnesota, North Dakota, South Dakota, Iowa, Missouri, Arkansas	Eighth	n/a
Illinois, Wisconsin	Seventh	Rueth
Kentucky, Tennessee	Sixth	Rapanos
Mississippi, Louisiana	Fifth	Harken / Needham

Therefore, a single Corps Division encompasses states governed by the diametrically opposite decisions of Rapanos and Needham, while also including states governed by the Rueth decision in the Seventh Circuit, and six states for whom the Eighth Circuit has provided no guidance at all.

Therefore, it is up to the regulators themselves to decide which test they will apply to the residents of those

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[9] The included districts are: St. Paul, Rock Island, St. Louis, Memphis, Vicksburg, and New Orleans.

[10] See http://www.mvd.usace.army.mil/main.php (Mississippi Valley Division of the Corps); 28 U.S.C.A. § 41 (2003) (Federal circuits).

states. Each regulator is individually confronted with a question upon which the United States federal court system has failed to reach unanimity. Such discretion is utterly inappropriate. What is more, this discretion has been enshrined in Corps and EPA policy. In January 2003, the EPA and the Corps issued a "Joint Memorandum and Advanced Notice of Proposed Rulemaking (ANPRM)" in an attempt to provide a clearer interpretation of SWANCC's meaning. 68 Fed. Reg. 1991-01 (Jan. 15, 2003). However, in that guidance, the regulators instructed the Corps field staff to "make jurisdictional and permitting decisions on a case-by-case basis, considering this guidance, applicable regulations and any additional relevant court decisions." Id. In other words, it has therefore devolved to the individual regulator to determine the reach of Congress's Clean Water Act jurisdiction.

B. The Rationale In Deaton Will Adversely Affect Vital Public Projects By Subjecting Them To The Onerous Individual 404 Permit Program In Many Cases.

To compound this problem, the Deaton decision has occurred at a time when the permitting process under the CWA is becoming increasingly onerous. In March 2000, the Corps made substantial changes to the "fast track" Nationwide Permit ("NWP") program under section 404 of the CWA; phasing out NWP 26 for impacts to isolated or headwaters areas and substituting it with a number of activity-specific nationwide permits.[11] Under the prior program, the Amici relied on NWP 26, which permitted

[11] See Corps, Final Notice of Issuance and Modification of Nationwide Permits, 65 Fed. Reg. 12,818 (Mar. 9, 2000). The permits were reissued, without significant modification in 2002. See Corps, Final Notice of Issuance of Nationwide Permits, 67 Fed. Reg. 2020 (Jan. 15, 2002).

discharges of up to three acres in certain "isolated" waters or "headwater" wetlands. However, under the revised program, there is a maximum one-half (1/2) acre limit for impacts to "Waters of the United States."

The Deaton rationale will sweep transitional waterbodies such as drainage ditches, and ephemeral ponds under the CWA "umbrella."[12] Given the size and scope of most public projects, it will be virtually impossible to come under the 1/2 acre NWP limit if ephemeral areas are considered jurisdictional. As a result, Amici's members will be denied access to the NWP process and be subject to the far more onerous and time-consuming individual permit process.[13]

III. The EPA and Corps of Engineers have Refused to Resolve the Current Jurisdictional Confusion.

The judiciary has not been the only branch of government confronting SWANCC and its progeny since the Court's 2001 decision. Following hearings in the House

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[12] The Preamble for the NWP regulations state that "an ephemeral stream is a water of the United States provided it has an ordinary high water mark (OHWM)." 65 Fed. Reg. 12,818, 12,823 (Mar. 9, 2000). The practical impact is that any person planning to impact a transitionally wet area, ranging from small rain depressions to dry washes must first obtain a 404 permit provided a Corps reviewer finds "water marks" on the ground that qualify as an OHWM, in his or her subjective judgment.

[13] The individual permit process involves a detailed evaluation of whether a proposed discharge is in the "public interest." The Corps considers and balances many factors and must determine that there are no practicable alternatives to the proposed discharge, see 33 C.F.R. § 322.4 (2003), and must also comply with EPA's detailed 404(b)(1) guidelines, see 40 C.F.R. § 230 (2003). This involves individual public notices allowing for agency and public comment that must be considered before a permit may be issued. The Corps must prepare detailed findings to support its permit decision.

Government Operations Committee, the Corps and EPA on January 15, 2003, issued a Joint Memorandum and ANPRM in an attempt to provide a clearer interpretation of SWANCC's meaning. 68 Fed. Reg. 1991. As noted above, the Memorandum leaves the legal determinations of jurisdiction to individual members of the agencies' field staff. Id. at 1998.

The ANPRM resulted in extensive comments for many affected interests. Over 133,000 comments were received. Groups issuing comments included four Indian Tribes, forty-two States, local governments, academic, research and scientific organizations, industry, non-profits, and the general public.[14] Much of the commentary provided information and data regarding the ecological value of various aquatic resources, including isolated wetlands and intermittent streams. At the other end of the spectrum, many comments rejected the idea that impact on aquatic resources is relevant to determining CWA jurisdiction.

Despite this massive outpouring of commentary, in a press release sent out on December 12, 2003, the EPA and the Corps made clear that they would take no action to resolve the confusion sown in the wake of the SWANCC decision, and would leave the January 2003 Joint Memorandum to stand unrevised.[15] However, that guidance does very little to clear up the quagmire of nebulous regulations. By providing no detailed or definitive criteria

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[14] Federal Jurisdiction of Navigable Waters Under Clean Waters, 2003 WL 56335158, at 6 (2003) (Statement of G. Tracy Mehan, Assistant Administrator for Water, U.S. Environmental Protection Agency).

[15] Release available at http://yosemite.epa.gov/opa/admpress.nsf/b1ab9f485b098972852562e7004dc686/540f28acf38d7f9b85256dfe00714ab0?OpenDocument.

for field staff, and in fact encouraging field staff to perform factual and legal comparisons of competing federal circuit cases on a case-by-case, permit-by-permit basis, Corps and EPA Headquarters have simply perpetuated the already intolerable level of confusion in the section 404 program.

CONCLUSION

It does not appear likely that either Congress or the Agencies will act to resolve the confusion that currently reigns among the regulated and regulators alike regarding the jurisdictional extent of the section 404 program in the wake of SWANCC. The Court should accept this case for review for two reasons. First, the current jurisdictional conflict regarding the jurisdictional reach of the CWA must be resolved. Second, silence by the Court may well amount to a de facto reversal of much of the holding in SWANCC. Clarification of these issues is essential to provide certainty and predictability to the vital public projects that depend upon clear federal guidance consistent with traditional authority of state and local governments in regulating land use.

January 30, 2004

Respectfully submitted

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IN THE
Supreme Court of the United States

JAMES S. and REBECCA DEATON,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF AMICUS CURIAE OF YELLOWSTONE DEVELOPMENT LLC IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE

Amicus Curiae Yellowstone Development LLC is involved in construction and development in the mountainous west.[1] It encounters regulatory issues, and on occasion possible compliance issues, concerning application of the requirements of Clean Water Act, as interpreted and applied by the U.S. Army Corps of Engineers, with respect to the definition of "waters of the United States."

This case squarely presents, in an enforcement context, what constitute "waters of the United States" for water bodies similar to the type that Yellowstone Development encounters in its projects – waters that are not adjacent to navigable waters, but that may flow through channels, for at least part of the year, that ultimately have a hydrological connection to waters that are navigable-in-fact.

SUMMARY OF ARGUMENT

This case presents an important and recurring question of law as to what constitute "waters of the United States" within the meaning of the Clean Water Act. The issue is of great practical significance for land development throughout the country. This question has not been but should be decided by this Court, and this case presents an appropriate vehicle for its resolution.

The phrase "waters of the United States", 33 U.S.C. § 1362(7), is the critical jurisdictional term that defines the reach of the Clean Water Act. The Court has previously considered

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[1] The parties have consented to the filing of this Amicus brief. Pursuant to Supreme Court Rule 37.6 Amicus states that this brief was not authored or funded by any person or entity other than Amicus or its counsel.

the meaning of that term in the context of bodies of water that are at or near the two end points of the continuum of possible water flows. *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) (isolated ponds, some only seasonal) ("*SWANCC*"); *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985) (wetlands abutting a navigable waterway).

This case squarely presents the issue of how the term "waters of the United States" should be defined in the context of the vast number of wetlands that are adjacent to putative water channels that lie between these end points. The Court has recognized that defining the limits of land and water would not be simple:

> Our common experience tells us that [wetlands identification] is no easy task: the transition from water to solid ground is not necessarily or even typically an abrupt one. Rather, between open waters and dry land may lie shallows, marshes, mudflats, swamps, bogs in short, a huge array of areas that are not wholly aquatic but nevertheless fall far short of being dry land. Where on this continuum to find the limit of "waters" is far from obvious.

Riverside Bayview, 474 U.S. at 132. This case presents that question for resolution.

The courts of appeals are in substantial conflict as to the principles that, under *SWANCC* and *Riverside Bayview*, should be applied in determining the necessary nexus to navigable waters inherent in the term "waters of the United States" and thus the extent to which development issues on lands adjacent to these flows are governed by Federal, as opposed to State,

law.[2] In light of the great practical significance of this issue, the Court should grant the Petition and resolve the ambiguity that now creates confusion for developers, State and Federal regulators, and communities throughout the country as to the source of law that governs uses of land that are adjacent to bodies of water that are physically removed from waters that are navigable-in-fact.

There are several reasons why this case constitutes a particularly appropriate vehicle through which to resolve this jurisdictional question. First, the expansive definition of "waters of the United States" that the U.S. Army Corps of Engineers utilized in this case was developed in the course of this enforcement proceeding and had never previously been adopted through notice and comment rulemaking. Thus, this case reflects one of the principal problems with the current state of the law in this area, that regulated entities have great difficulty in ascertaining what body of law governs their obligations and their rights.

Second, the Fourth Circuit adopted an extremely broad construction of the term "waters of the United States", which would extend Federal jurisdiction to "any branch of a tributary system that eventually flows into any navigable body of water." (Pet. App. 20a (emphasis added)). The court of appeals' standard would sweep within federal jurisdiction over "navigable" waters limitless non-navigable flows. There is no regulatory consensus as to where a tributary system begins or

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[2] *Compare United States v. Deaton*, 332 F.3d 698, 711 (4th Cir. 2003) (Federal "jurisdiction extends to any branch of a tributary system that eventually flows into a navigable body of water", including a roadside ditch) (Pet. App. 20a), and *United States v. Rapanos*, 339 F.3d 447, 453 (6th Cir. 2003) (same), *with In re Needham*, 2003 U.S. App. LEXIS 25318 (5th Cir. Dec. 16, 2003) (rejecting Federal regulation over roadside ditches on the ground that, under the interpretation of Section 1362(7) in *SWANCC*, a body of water is subject to Federal regulation only if "'the body of water is actually navigable or adjacent to an open body of navigable water.'")

when a water flow becomes part of a tributary system, especially in the conditions experienced in the semi-arid western mountain States where Amicus operates. While the test fashioned by the Fourth Circuit might have superficial appeal to a layman, in practice that standard would be very difficult to apply.

Finally, the Fourth Circuit's construction of "waters of the United States" would cut deeply into the responsibilities traditionally exercised by the States over the regulation of water flows and the development of land resources that abut those water flows. States manage their land and water resources by regularly distinguishing among types of water flows to avoid imposing water regulation on land features. There is no "clear indication" in the Clean Water Act that Congress intended an administrative interpretation at the "outer limits of Congress's power" that would alter the Federal-State balance in this manner. *SWANCC*, 531 U.S. at 172-173. Rather, the Fourth Circuit ignored express provisions of the statute that sought to prevent wholesale displacement of the primary State responsibility over development of land and water resources. 33 U.S.C. §§ 1251(b), 1370(2).

ARGUMENT

I. THE COURTS OF APPEALS ARE IN CONFLICT OVER THE DEFINITION OF THE JURISDICTIONAL TERM "WATERS OF THE UNITED STATES", AND THE POLAR INTERPRETATION ADOPTED BY THE FOURTH CIRCUIT IS NOT SUPPORTED BY A "CLEAR INDICATION" OF CONGRESSIONAL INTENT.

A. *There Is a Conflict Among the Circuits Concerning the Application of Section 1362(7) to Inland Waters That Are Not Navigable in Fact.*

The courts of appeals are in conflict as to the principles that should be applied in determining whether water flows that are physically removed by some distance from navigable-in-fact waters constitute "waters of the United States," within the meaning of 33 U.S.C. § 1362(7). This conflict creates confusion and inconsistency as to the extent to which the rights and obligations of persons who wish to develop lands adjacent to these water flows are governed by Federal, as opposed to State, law.

In *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985), the Court held that the Corps of Engineers had jurisdiction under Section 404(a) of the Act, 33 U.S.C. § 1344(a), over nonnavigable wetlands that actually abutted on a navigable waterway. The Court found that there was a significant nexus between these wetlands and navigable waters, so that the wetlands constituted "waters of the United States" within the meaning of 33 U.S.C. § 1362(7). The Court explicitly reserved judgment on the "question of the authority of the Corps to regulate discharges of fill material into wetlands that are not adjacent to bodies of open water." *Id.* at 131-132.

In *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001), the Court held that the Corps of Engineers did not have jurisdiction under Section 404(a) over isolated ponds in an abandoned sand and gravel pit, some of which were only seasonal. The Court emphasized the importance of the term "navigable" in Section 1362(7) and that the use of the phrase "waters of the United States" did not constitute a basis for reading "navigable" out of the statute. *Id.* at 171-172. The Court also specified that its

decision in *Riverside Bayview* was based upon the "significant nexus" between the wetlands and "navigable waters" *Id.* at 167. The Court cautioned that when an administrative interpretation of a statute invokes the outer limits of Congress' power, it expected "a clear indication" that Congress intended that result, especially when "the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power." *Id.* at 172-173. The Court found "nothing approaching a clear statement from Congress" that it intended Section 404(a) to reach the isolated ponds and concluded that the Clean Water Act had been written to avoid "the significant constitutional and federalism questions" that would be raised by the Corps of Engineers' interpretation. *Id.* at 174.

The courts of appeals disagree as to whether Section 1362(7) should be applied to encompass any non-navigable water flow that, in a strict hydrological sense, might ultimately flow into other bodies of water that are navigable, despite the nature of the flow or its proximity to a navigable body of water. In this case, the Fourth Circuit held that Federal "jurisdiction extends to any branch of a tributary system that eventually flows into a navigable body of water", including a roadside ditch, and thus to any wetlands that are adjacent to those water flows. Pet. App. 20a. Similarly, in *United States v. Rapanos*, 339 F.3d 447, 453 (6th Cir. 2003), the Sixth Circuit overturned a district court holding, based on *SWANCC*, that wetlands must be "directly adjacent to navigable waters" to be subject to regulation under the Clean Water Act. Instead, it explicitly adopted the Fourth Circuit's interpretation in *Deaton*. *See also United States v. Rueth Development Co.*, 335 F. 3d 598, 604 (7th Cir.), *cert. denied,* 124 S. Ct. 835 (2003) (relying upon the Fourth Circuit's holding in *Deaton).*

By contrast, in *In re Needham*, 2003 U.S. App. LEXIS 25318 (5th Cir. Dec. 16, 2003), the Fifth Circuit rejected as "unsustainable under *SWANCC*", the Federal government's argument that the regulatory definition of "navigable waters" extends to all tributaries of navigable in fact waters, including ditches, "that have any hydrological connection with 'navigable waters.'" *Id.* at 9-10. The court ruled that "in this Circuit . . under SWANCC, 'a body of water is subject to [Federal] regulation . . . if 'the body of water is actually navigable or adjacent to an open body of navigable water.'" *Id.* at *10, *citing Rice v. Harken Exploration Co.*, 250 F.3d 264, 269 (5th Cir. 2000).

Needham and *Rice* arose under the Oil Pollution Act, 33 U.S.C. §§ 2701-2720, rather than under the Clean Water Act. The OPA imposes strict liability upon parties that discharge oil into "navigable waters", a term that is defined in 33 U.S.C. § 2701(21) to mean "the waters of the United States, including the territorial sea." The language of this definitional provision thus is identical, in pertinent part, to the definition in Section 1362(7) of the Clean Water Act, and the two provisions are co-extensive. *Needham*, 2003 U.S. App. LEXIS, at *6.

Accordingly, there is a sufficient conflict to justify granting the Petition, in view of the great practical importance of the question.

B. The Polar Interpretation Adopted by the Fourth Circuit Is Not Supported by a "Clear Indication" of Congressional Intent to Extend Federal Jurisdiction to the Furthest Reaches Permitted by the Constitution.

The Fourth Circuit's decision would extend Federal jurisdiction to "any branch of a tributary system that eventually flows into any navigable body of water." (Pet. App. 20a)

(emphasis added). Since in a hydrological sense all water flows downhill, this definition is virtually without limitation in its own terms. It would drive to the outermost limit of authority granted the Federal government under the Commerce Clause of the Constitution. The construction adopted below would substantially interfere with State authority in the regulation of water flows, and thus in the regulation of development activities adjacent to those water flows.

The decision below thus clearly invokes the principle identified in *SWANCC*, that a "clear indication" of Congressional intent is required for an administrative interpretation at "the outer limits of Congress' power", which would "alter the federal-state balance by permitting Federal encroachment upon a traditional state power." *SWANCC*, 531 U.S. at 172-173. The Fourth Circuit pointed to nothing in the language or legislative history of the Clean Water Act that would suggest that Congress, through its definition of "navigable waters", intended to sweep within the Federal regulatory scheme virtually all non-navigable water flows in the country, whether confined within natural or man-made channels, and regardless of their flow rate, duration of flow, or distance from open water.

To the contrary, in adopting the Clean Water Act, Congress recognized the responsibilities traditionally exercised by the States over the regulation of water flows and land uses and intended to preserve State authority, to the extent that jurisdiction was not otherwise reserved to the Federal government in the statute. In particular, as the Court noted in *SWANCC*, in 33 U.S.C. § 1251(b), Congress chose to "recognize, preserve, and protect the primary responsibilities and rights of the States to prevent, reduce and eliminate pollution [and] to plan the development and use (including restoration, preservation, and enhancement) of land and water

resources . . . ." *See SWANCC*, 531 U.S. at 166-167. Further, in 33 U.S.C. § 1370, Congress explicitly provided:

> Except as expressly provided in this chapter [the Clean Water Act], nothing in this chapter shall . . .
>
> (2) be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to waters (including boundary waters) of such States.

Taken together, Sections 1251(b) and 1370(2) demonstrate that, in adopting the Clean Water Act, Congress acted with sensitivity toward traditional State powers and did not intend a wholesale alteration in the balance of Federal and State responsibilities for land and water development issues. As in *SWANCC*, these statutory provisions, and the failure of the Corps of Engineers to provide a "clear indication" of an explicit Congressional intent to authorize the agency to push to the limit of Federal constitutional power, create substantial grounds for doubting the validity of the maximalist interpretation of Section 1362(7) adopted by the court of appeals.

Since the Fourth Circuit's interpretation has subsequently been adopted by at least one other Circuit, the Court should grant the Petition in this case at this time, to resolve this important question concerning the respective jurisdictions of the State and Federal governments.

C. The Fourth Circuit's Interpretation Raises Significant Issues of Due Process.

The Petition also should be granted to assure that due process concerns are addressed. The definition of "waters of the United States" that the Corps of Engineers advocated in this case was developed and applied in the course of an

enforcement proceeding. That expansive definition had not previously been adopted by the agency through notice and comment rulemaking. The landowners therefore did not have formal notice of the great breadth with which the agency would seek to interpret the term. Indeed, to the extent that the Corps of Engineers previously had addressed the issue in preambles to its rules, the agency had adopted a much narrower interpretation of the term as applied to ditches that are far removed from open waters or waters that are navigable-in-fact. *See* Pet. at 4 n.3.

Since the Clean Water Act may be enforced criminally as well as civilly, the agency's failure to provide notice of the extreme reach it claims for the statute presents significant due process concerns. *See Bowen v. Georgetown University Hosp.*, 488 U.S. 204 (1988) (rejecting agency litigation position unsupported by regulations, rulings, or administrative practice); *United States v. Apex Oil Co.*, 132 F.3d 1287 (9th Cir. 1997) (rule of lenity applied where definitional section of regulation was ambiguous).

The due process concerns reinforce the conclusion that it is unlikely that Congress intended the term "navigable waters" to carry the far reaching meaning adopted by the Fourth Circuit. If there was any support in the Clean Water Act for the lower court's extension of Federal authority, due process concerns would require, at a minimum, that regulated parties be provided clear, adequate notice of the position. The lower court's decision fails to give proper weight to these Constitutional concerns.

II. SOURCE, DURATION AND FLOW OF WATERS ARE AMONG THE FACTORS THAT ARE PERTINENT TO DEFINING "WATERS OF THE UNITED STATES" AND IGNORED IN THE FOURTH CIRCUIT'S STANDARD.

In allowing Federal authority over any water that "might ultimately flow" to navigable water, the Fourth Circuit failed to consider the varied physical circumstances of non-navigable water flow. In contrast, the States, which have the most immediate knowledge of the geographic, hydrologic, climatic and geomorphologic conditions within their jurisdictions, routinely consider the nature and duration of water flows in deciding whether and how to regulate water flows and land uses. The lower court's standard would create conflicts with State laws by extending Federal authority of low, infrequent non-navigable flows.

The simple hydrologic nexus test adopted by the Fourth Circuit also ignores the need to define when a tributary system begins or when a water flow becomes part of a tributary system, especially in the conditions that apply in the semi-arid western States in which Amicus does business. There is no Federal definition of "tributary." It is often not possible for a person to know when a water flow enters a tributary and thus when, under the Fourth Circuit standard, Federal regulation of the "water body" would begin and state management of the land resources end.

There are multiple examples of extant definitions addressing geographic features that could be part of a tributary system or could constitute the point at which a water body commences. Review of even a few definitions shows that the Fourth Circuit's standard ignores significant technical and

policy concerns that are critical to deciding the limits of Federal jurisdiction under the Clean Water Act.

A. State Definitions Consider Duration and Nature of Flows for Regulatory Purposes.

The Clean Water Act's "federal-state balance", *SWANCC*, 531 U.S. at 172-173, reflects, in part, the recognition that the States have the most immediate knowledge of geographic, hydrologic and geomorphological conditions within their jurisdictions. The statute specifically protects the States' authority to establish management choices for their "land and water resources," 33 U.S.C. §§ 1251(b), 1370(2). States routinely consider features of duration and water source in defining their waters and in establishing regulatory standards. An over-simplified hydrologic standard – can water flow? – is not a sufficient way to distinguish between a land feature and a water feature. The lower court's decision warrants review to avoid unnecessary conflicts between State enactments and a Federal jurisdictional standard "at the outer limits" of Congressional authority.

Defining the point in the landscape where land ends and a water body begins involves technical and policy considerations. The States are keenly aware of the importance of identifying where a water system commences. Many States use definitions that distinguish among ephemeral, intermittent and perennial waters, addressing duration or source of the flow. Examples of such distinguishing definitions from mountain States include laws in Idaho[3], Arizona,[4] Montana[5], Utah[6], and Wyoming[7].

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[3] Idaho defines intermittent waters as "a stream, reach, or water body which has a period of zero (0) flow for at least one (1) week during most years. Where flow records are available, a stream with a...hydrologically-based flow of less than one-tenth (0.1) cfs is considered intermittent." IDAPA 58.01.02.003 (2003). The State defines an ephemeral water as "a stream,

By contrast, neither Congress nor the Federal agencies have promulgated a definition of "tributary" or "tributary system," or

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reach, or water body that flows only in direct response to precipitation in the immediate watershed and whose channel is at all times above the water table." IDAPA 58.01.01.260 (2003). Water quality standards apply to intermittent waters "during optimum flow periods sufficient to support the uses for which the water body is designated," and variances are allowed when "natural, intermittent, or low flow conditions or water levels prevent the attainment of the standard. IDAPA 58.01.02.070 (2003); IDAPA 58.01.02.260 (2003).

[4] Arizona defines an ephemeral water as "a surface water that has a channel that is at all times above the water table, and that flows only in direct response to precipitation." A.A.C. § R18-11-101(22) (2003). An intermittent surface water is a "stream or reach of a stream that flows continuously only at certain times of the year, as when it receives water from a spring or from another surface source, such as melting snow." *Id.* at (30).

[5] Montana defines an ephemeral stream as "a stream or part of a stream which flows only in direct response to precipitation in the immediate watershed or in response to the melting of a cover of snow and ice and whose channel bottom is always above the local water table." MONT. ADMIN. R. 17.30.602(11) (2003). An intermittent stream is a "stream or reach of a stream that is below the local water table for at least some part of the year, and obtains its flow from both surface run-off and groundwater discharge. *Id.* at (15).

[6] Utah defines ephemeral streams as those that flow "only in direct response to precipitation in the immediate watershed, or in response to the melting of a cover of snow and ice, and which has a channel bottoms that is always above the local water table." U.A.C. R645-100-200 (2002). Intermittent streams include those streams, or their reaches, that "drains a watershed of at least one square mile" or is "below the local water table for at least some part of the year and obtains its flow from both surface runoff and groundwater discharge." *Id.*

[7] Wyoming defines an "ephemeral stream" as "a stream which flows only in direct response to a single precipitation [sic] in the immediate watershed or in response to a single snow melt event, and which has a channel bottom that is always above the prevailing water table." WCWR 020-080-001(b)(xiii) (2003). An "intermittent stream" is "a stream or part of a stream where the channel bottom is above the local water table for part of the year, but is not a perennial stream." *Id.* at (b)(xxiv). A "perennial stream" is "a stream or part of a stream that flows continually during all of the calendar year as the result of groundwater discharge or surface runoff." *Id.* at (b)(xxxvii).

of the different types of water bodies that can occur within a tributary system, for purposes of determining Clean Water Act jurisdiction.[8] Rather, Federal regulations defining "waters of the United States" fail to clearly establish a sound relationship between some water flowing over land and "navigable waters."

The different classifications of streams used by the States lead to different regulatory consequences. For example, Idaho regulates work in and alterations to stream channels,[9] only in "natural water course[s] of perceptible extent with definite bed and banks which confine and conducts continuously flowing water."[10] Continuously flowing water is defined as "[a] sufficient flow of water that could provide for migration and movement of fish, and excludes those reaches of streams

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[8] There are no federal definitions of "ephemeral," "intermittent," and "perennial" waters other than those that were included within the Corps of Engineers' nationwide permits, as certain terms of the nationwide permits did not apply to ephemeral waters. *See* Issuance of Nationwide Permits; Notice, 67 Fed. Reg. 2,020, 2,094 (Jan. 15, 2002) (joint notice by EPA and Corps of Engineers). For these purposes, an ephemeral stream is defined as : "ha[ving] flowing water only during and for a short duration after, precipitation events in a typical year. Ephemeral stream beds are located above the water table year-round. Groundwater is not a source of water for the stream. Runoff from rainfall is the primary source of water for stream flow." Intermittent streams have "flowing water during certain times of the year, when groundwater provides water for stream flow. During dry periods, intermittent streams may not have flowing water. Runoff from rainfall is a supplemental source of water for stream flow." These definitions do not apply to other Clean Water Act programs. The Corps of Engineers' regulation defining "waters of the United States" includes only "intermittent" streams. 33 C.F.R. § 328.3(a)(3). However, the United States has not disclaimed jurisdiction over "ephemeral" waters as well. *See, e.g.*, 67 Fed. Reg. at 2,075 ("...we are not suggesting that ephemeral streams are not jurisdictional waters under the Clean Water Act.")

[9] IDAPA 37.03.07.010 (2003).

[10] *Id.*

which, in their natural state, normally go dry at the location of the proposed alteration."[11]

In Utah, "ephemeral" and "intermittent" streams are treated differently with respect to coal mining and stream diversions.[12] Montana's coal mining statute offers distinctions between "ephemeral drainageways" and "intermittent streams" in a manner similar to Utah. Land within 100 feet of a perennial or intermittent stream or reach may not be disturbed by mining operations except as approved by State regulators.[13] In addition, Montana has expressly determined that certain low flow waters should not be subject to certain water quality regulations. This occurs under Montana's water quality statute which includes a policy of nondegradation of "high quality waters."[14] Excluded from the category of high quality waters are those "surface waters that . . . have zero flow or surface expression for more than 270 days during most years."[15]

The Western Governor's Association position on Clean Water Act programs emphasizes the need for giving States flexibility to manage land and water resources.

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[11] *Id.*

[12] Among the regulatory distinctions, land within 100 feet of a perennial or intermittent stream may not be disturbed by mining operations unless specifically approved by the state *See generally* U.A.C. R645-301-700 (2002) (stream diversions).

[13] MONT. ADMIN. R.17.24.602(1) (2003). Ephemeral drainageways flow "only in response to precipitation in the immediate watershed or in response to the melting snow or ice and is always above the local watertable." Intermittent streams are those that are "below the water table for at least some part of the year and that obtains its flow from both ground water discharge and surface runoff."

[14] Mont. Code Anno. § 75-5-303 (2003).

[15] Mont. Code Anno. § 75-5-103(10)(b) (2003).

> Much of our region is characterized by unique physical, chemical, hydrologic, and biological conditions and contains countless ephemeral streams, effluent-dependent streams, and man-made water conveyance systems. These streams flow only in response to sporadic precipitation, snowmelt, runoff, wastewater discharges, or the conveyance of water or reclaimed water intended for specific purposes. Western Governors urge your committee in reviewing the CWA, to take into account this environment.
>
> Watershed management should not be dictated by the federal government. Watersheds should be managed to meet people's needs while protecting our environmental resources. Federal methodology mandates are by definition "one size fits all" and are not appropriate for each and every state. Outcomes are more important to us than processes.[16]

Amicus does not suggest that any particular State approach is mandated by the Clean Water Act. States may have varied technical and policy reasons for adopting particular definitions of different water features and setting regulatory consequences that flow from the definitions. However, the Clean Water Act clearly preserved the authority of the States to regulate their land and water resources in this manner. Amicus submits that the Fourth Circuit's standard ignores the important physical and policy factors that the States have wrestled with and adopts a categorical test that would intrude on these State powers. That the States have routinely considered factors ignored by the

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[16] *Hearing on Governors' Perspectives on the Clean Water Act Before the House Comm. On Transportation and Infrastructure, Sub-Comm. On Water Resources & Environment*, 106th Cong. (Feb. 23, 199) (statement of Wyoming Governor Jim Geringer) *available at* http://www.westgov.org/wga/testim/cwa-wy.htm.

Fourth Circuit – such as duration and nature of flow – in defining their waters underscores the importance of the Petition and casts doubt upon the validity of the overly simplistic standard adopted below. Regulated parties like the Amicus suffer under the current legal atmosphere in which there is great disparity between Federal and State definitions of water and confusion over the soundness of the differing Federal and State approaches.

B. The Fourth Circuit's Broad Standard Would Extend Clean Water Act Jurisdiction to Land Features.

The Fourth Circuit's interpretation also ignores important lessons to be drawn from the varied technical vocabulary used to describe the point where land stops and water begins. The lower court apparently assumed, without supporting authority, that the start of a tributary system could be easily discerned, in deciding that a simple hydrological measure would provide a sufficient nexus to navigable waters to support Federal jurisdiction. However, between rainfall and snow melt traversing land and a traditionally navigable water, flow may occur in many different geographic features. Not only are these flows non-navigable, but there is no consensus on the point where such flow becomes part of a tributary system to a navigable water. Absent clear definitions, the Fourth Circuit's interpretation could extend Federal jurisdiction to many features commonly viewed as land.

A few examples illustrate this point. "Sheet flow" or "run off" are different terms frequently used to describe water before it becomes part of a stream or tributary system.[17] However, the

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[17] *See* GLOSSARY OF GEOLOGY 560, 587 (Julia Jackson ed., 1997) (Sheet flow is an "overland flow or downslope movement of water taking the form of a thin, continuous film over relatively smooth soil or rock surfaces and not concentrated into channels larger than rills."); Shuh-shiaw Lo, GLOSSARY OF

commonly-used, authoritative definitions do not readily identify the point of origin of a tributary system. There are many other common terms used to describe the small, frequently temporary, shallow features over which or through which water may flow before it becomes a "tributary." These include terms such as rills, gullies, erosion gullies, ephemeral gullies and ephemeral streams. It is far from clear where, among these various features, a tributary system begins and land ends.

For example, rills are defined as "[a] microchannel (usually a few inches deep) in which water concentrates as it runs downslope," "[a] rivulet," "[a] very small brook or stream," "[a] rill channel" which is also known as a "shoestring rill."[18] Gullies are channels "deeply eroded by water which usually flows only due to storm water runoff or during the melting of snow. A gully is smaller than a ravine, larger than a rill...."[19] Erosion gullies are created due to "erosion of soil or soft rock material by running water that forms distinct, narrow channels that are larger and deeper than rills and that usually carry water

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HYDROLOGY 1275, 1344 (Sheng Te Printers Ltd. 1992) (noting unchanneled nature of sheet flow and run off); GLOSSARY OF TERMS, Soil Science Society of America *available at* http://www.soils.org/sssagloss/search.html (noting unchanneled nature of sheet flow and run off); United States Geological Survey, USGS WATER SCIENCE GLOSSARY OF TERMS *available at* http://ga.water.usgs.gov/edu/dictionary.html: ("(1) That part of the precipitation, snow melt, or irrigation water that appears in uncontrolled surface streams, rivers, drains or sewers. Runoff may be classified according to speed of appearance after rainfall or melting snow as direct runoff or base runoff, and according to source as surface runoff, storm interflow, or groundwater runoff. (2) The total discharge described in (1), above, during a specified period of time. (3) Also defined as the depth to which a drainage area would be covered if all of the runoff for a given period of time were uniformly distributed over it.").

[18] *See* GLOSSARY OF HYDROLOGY 1249; *see also* GLOSSARY OF GEOLOGY 550.

[19] GLOSSARY OF HYDROLOGY 457; *see also* GLOSSARY OF GEOLOGY 211.

only during and immediately after heavy rains or following the melting of ice and snow."[20] Ephemeral gullies are "small channels eroded by concentrated flow that can be easily filled by normal tillage, only to reform again in the same located by additional runoff events."[21]

Persons like the Amicus, operating in semi-arid mountain terrain, live and work in locations with highly varied seasonal water flow on their property. During snow melt or storm events, water flows downhill over land and land features that arguably meet the definitions of rills, gullies, erosion gullies, ephemeral gullies or ephemeral streams. As a practical matter, those land feature over which the water may flow would be considered land, not water, under common understanding and for most purposes under State and local law. Yet under the jurisdictional standard adopted by the court below, because water could eventually flow from these features to navigable waters, all would be Federally regulated as a putative tributary system.

Before Federal jurisdiction over "navigable waters" is extended to these kinds of land features, there should be a clear indication of Congressional intent. At a minimum, the Federal agencies should be required to clarify through rulemaking – and notify landowners and the States – how far they think the Clean Water Act extends Federal jurisdiction over water flow over land, rather than arguing for sweeping extensions of Federal jurisdiction on a case by case basis in enforcement actions.

Under the lower court's approach, Federal jurisdiction arises wherever flow occurs, regardless of distance to navigable waters, duration of flow at the putative "starting point", source

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[20] GLOSSARY OF HYDROLOGY 635.

[21] *See* GLOSSARY OF TERMS, Soil Science Society of America *available at* http://www.soils.org/sssagloss/search.html.

of the water, or nature of the putative feature transmitting the water. Between the extremes previously addressed by this Court – adjacent to navigable waters and fully isolated from any other waters – water may flow in a manner and over a course that would not, under many State laws or common understanding, be part of a "tributary system." These important issues presented by the lower court's decision warrant review by this Court.

CONCLUSION

Amicus respectfully requests that the Court grant the Petition for a Writ of Certiorari.

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In The
Supreme Court of the United States

JAMES S. and REBECCA DEATON, *Petitioners,*

v.

UNITED STATES OF AMERICA, *Respondent.*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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The American Petroleum Institute ("API") respectfully files this brief *amicus curiae* in support of petitioners James and Rebecca Deaton in Case No. 03-701.[1] The petition seeks review of the judgment of the United States Court of Appeals for the Fourth Circuit that the Army Corps of Engineers ("Corps") had the authority under Section 404(a) of the Clean Water Act ("CWA"), 33 U.S.C. § 1344(a), to regulate a roadside ditch abutting petitioners' property in Wicomico County, Maryland, and wetlands located on the petitioners' property. *United States v. Deaton*, 332 F.3d 698 (4th Cir. 2003). Neither the roadside ditch nor the wetlands are adjacent to any navigable water body. *Amicus* believes that the Fourth Circuit misconstrued the Act, in light of this Court's decision in *Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs*, 531 U.S. 159 (2001) ("*SWANCC*").

INTEREST OF THE *AMICUS CURIAE*

API is a non-profit, nationwide trade association representing more than 400 member companies engaged in all aspects of the petroleum and natural gas industry. Among other things, it is API's objective to promote the interests of the petroleum and natural gas industry in all of its branches. API regularly represents the petroleum and natural gas industry in administrative rulemaking

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[1] No counsel for any party has authored this brief in whole or in part. No entities other than API and its members have made monetary contributions to the preparation and submission of this brief. In addition, written consent has been obtained from counsel for all petitioners and the respondent for the filing of this brief pursuant to Supreme Court Rule 37. The letters reflecting consent have been filed with the Clerk's Office.

proceedings in the various state and federal agencies, and in litigation in the state and federal courts.

The petroleum and natural gas industry consists of various types of facilities that are widely dispersed throughout the nation, including tens of thousands of production wells, more than 100 refineries, more than 1,000 terminals, more than 5,000 bulk storage plants, and more than 100,000 service stations. While many of those facilities are located near navigable waters or adjacent wetlands, many others are distant from any navigable waters or adjacent wetlands, but could still be subject to CWA regulation under the Fourth Circuit's decision. API shares the concern of the petitioners that the implementation of the CWA conform to the clear intent of Congress.

REASONS FOR GRANTING THE WRIT

The Fourth Circuit misread this Court's decision in *SWANCC* and thus failed to apply the intent of Congress in enacting the CWA. The Fourth Circuit decision potentially affects the entire system of programs under the CWA, creates a conflict with the Fifth Circuit over the scope of the CWA, and will result in significant, unjustified economic burdens for American industry. For these reasons and the reasons set forth in the petition, the Court should grant the writ.

I. THE FOURTH CIRCUIT FAILED TO FOLLOW *SWANCC*.

A. The Fourth Circuit Allowed CWA Regulation Of Areas That Are Neither Navigable-In-Fact Waters Nor Adjacent To Such Waters.

In *Deaton*, the Fourth Circuit ignored the overriding import of the *SWANCC* decision. In *SWANCC*, this Court struck down the "Migratory Bird Rule" as exceeding the Corps' authority under the CWA. In reaching its decision in *SWANCC*, this Court found that Congress clearly intended to limit the application of the CWA to navigable-in-fact waters or "traditional navigable waters," and wetlands adjacent to such waters. The Fourth Circuit thus erred in finding the CWA "sufficiently ambiguous" to require judicial deference to the Corps' assertion of authority over a roadside drainage ditch and wetland far removed from any traditional navigable waters.

In *SWANCC*, this Court found "§ 404(a) [of the CWA] to be clear." *SWANCC*, 531 U.S. at 172. Section 404(a) authorizes the Corps to regulate discharges of dredged or fill material into "navigable waters," which are defined as "the waters of the United States, including the territorial seas," 33 U.S.C. § 1362(7). What this Court *expressly* said was clear about section 404(a) is that it was not intended to regulate nonnavigable, isolated, intrastate waters, such as the abandoned gravel pit at issue in *SWANCC*.

This Court reached its express conclusion as follows. First, the Court pointed out that in 1974, the Corps originally interpreted the term "navigable waters" to mean "those waters of the United States which are subject to the ebb and flow of the tide, and/or are presently, or have been in the past, or may be in the future susceptible for use for purposes of interstate or foreign commerce," 33 CFR § 209.120(d)(1) (1974). *Id.* at 168. Such waters are often referred to as "navigable-in-fact waters" or "traditional navigable waters." The Court highlighted the Corps' position in 1974 that "it is the water body's capability of use by the public for purposes of transportation or commerce which is the determinative factor," 33 CFR § 209.260(e)(1) (1974). *Id.*

The Court then said that the respondents "put forward no persuasive evidence that the Corps mistook Congress' intent in 1974." *Id.* In other words, as of the 1972 version of the CWA, "navigable waters" meant traditional navigable waters.

Advocates of an expansive construction of the CWA, including the Corps in *SWANCC*, often point to a statement in the 1972 Conference Report that the conferees "intend that the term 'navigable waters' be given the broadest possible constitutional interpretation," S. Conf. Rep. No. 1236, 92d Cong., 2d Sess. 144 (1972). Yet this Court found, quite to the contrary, that "neither this, nor anything else in the legislative history to which [the Corps] point[s], signifies that Congress intended to

exert anything more than its commerce power over navigation." 531 U.S. at 168 n.3.[2]

Having found the intent of the 1972 Act to be clear, the Court next considered whether Congress took a new direction in the 1977 amendments. *Id.* at 168-71. It found that Congress did not take such a new direction.

The Corps had argued that in the 1977 amendments, Congress had broadly approved new regulations of the Corps that asserted CWA authority over waters and wetlands, without any consideration of navigability. *See id.* at 168-69. The Court found insufficient evidence of any such approval. *Id.* at 170. The Court found that the only aspect of the Corps' 1977 regulations that Congress had approved was the assertion of authority over wetlands *adjacent to traditional navigable waters.*

Wetlands adjacent to traditional navigable waters constitute a special case that the Court had addressed earlier in *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985). Indeed, in *SWANCC*, the Court was careful to dispel any notion that its earlier ruling in *Riverside Bayview Homes* should be construed to extend federal authority to anything other than wetlands adjacent to

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[2] Unstated in the Court's opinion in *SWANCC* is that before 1972, in implementing the Rivers and Harbors Act, the Corps had adopted a cramped view even of traditional navigable waters, as described in modern federal case law. *See* Albrecht and Nickelsburg, *Could SWANCC Be Right? A New Look At The Legislative History Of The Clean Water Act*, 32 Envtl. L. Rep. 11042, 11044-46 (2002). Thus, in enacting the CWA in 1972, Congress apparently wanted to ensure that the Corps would exercise its full constitutional power *over navigation*. *Id.* at 11048-49.

navigable-in-fact waters, or as the Court put it, "adjacent to bodies of open water." 531 U.S. at 167.

Although in *Riverside Bayview Homes* the Court had suggested that the term "navigable" in the CWA was of "limited import," 474 U.S. at 133, in *SWANCC* the Court emphasized the continued importance of the term "navigable":

> [I]t is one thing to give a word limited effect and quite another to give it no effect whatever. The term "navigable" has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made.

531 U.S. at 172. In order to rule for the respondents in *SWANCC*, the Court said that it "would have to hold that the jurisdiction of the Corps extends to ponds that are *not* adjacent to open bodies of water." *Id.* at 168. However, the Court concluded that "the text of the statute will not allow this." *Id.*

Thus, to reach its express conclusion that section 404(a) was not intended to regulate nonnavigable, isolated, intrastate waters, such as the abandoned gravel pit at issue in *SWANCC*, the Court found that the 1972 Act clearly applied only to traditional navigable waters, and that Congress did not fundamentally change this in the 1977 amendments, although Congress did specifically authorize regulation of wetlands *adjacent to traditional navigable waters* in 1977. In other words, the Court found

clear Congress' intent to limit the scope of the CWA to traditional navigable waters and wetlands adjacent to traditional navigable waters.

Nonetheless, the Fourth Circuit in *Deaton* found the statute to be "ambiguous." *Deaton*, 332 F.3d at 709-11. It said that the Corps' 1974 definition, which was limited to traditional navigable waters, only "captured what *SWANCC* holds to be Congress's *general intent* in enacting the CWA." *Id.* at 711 (emphasis added). Accordingly, the Fourth Circuit deferred to the Corps' assertion of authority over the roadside ditch and the nearby wetland, under the second step of the *Chevron*[3] analysis.

The Fourth Circuit thus erred. It ignored the reasoning of this Court in *SWANCC* that the statute is clear, and that the statute only applies to traditional navigable waters and adjacent wetlands. As a result, it erroneously permitted the Corps to regulate a drainage ditch and a wetland, neither of which is a traditional navigable water or even adjacent to a traditional navigable water.

B. The Fourth Circuit Allowed CWA Regulation Of Areas Lacking Even A "Significant Nexus" To Any Navigable-In-Fact Water.

The Fourth Circuit stated that "[t]he precise question here is whether the Clean Water Act extends to distant, nonnavigable tributaries of navigable waters." 332 F.3d at 709. This is not only the heart of the issue in *this* case, but also in many of the other cases being

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3 *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837 (1984).

decided by the various lower federal courts, which are reaching varying conclusions.

Following *SWANCC*, some courts and commentators have concluded that there must at least be a "significant nexus" between a nonnavigable water body or wetland and a traditional navigable water in order to support CWA jurisdiction. *See, e.g., FD&P Enterprises Inc. v. United States Army Corps of Eng'rs*, 239 F.Supp.2d 509, 516 (D.N.J. 2003). This is based on the Court's explanation in *SWANNC* that "[i]t was the significant nexus between the wetlands and 'navigable waters' that informed our reading of the CWA in *Riverside Bayview Homes*." 531 U.S. at 167.

The Fourth Circuit itself recognized this principle, but then failed to apply it. It literally ignored the word "significant":

> In *Riverside Bayview* the Supreme Court concluded that the Corps regulation extending jurisdiction to adjacent wetlands was a reasonable interpretation in part because of what *SWANCC* described as "the significant nexus between the wetlands and 'navigable waters.'" . . . There is also *a nexus* between a navigable waterway and its nonnavigable tributaries.

332 F.3d at 712 (emphasis added). Elsewhere, the Fourth Circuit characterized *SWANCC* as "suggesting that covered nonnavigable waters are those with *some connection* to navigable ones." *Id.* at 709 (emphasis added). Thus, the Fourth Circuit reduced a "significant" nexus to merely "a" nexus or "some connection."

However, it is clear from *SWANCC* that "a" nexus or "some connection" is not sufficient. At the very least, *SWANCC* established that there must be a "significant nexus" with a navigable-in-fact water in order to confer CWA jurisdiction over a distant, nonnavigable "tributary," such as the drainage ditch in this case.

Nor is this merely a matter of semantics. Although the Fourth Circuit found that there was some evidence that discharges into nonnavigable tributaries *can have* substantial effects on the quality of navigable waters, 332 F.3d at 712, there was no specific evidence of such effects of the ditch or "tributary" at issue in the case, *see* Petition for Writ of Certiorari, *Deaton v. United States*, No. 03 - 701, at 7-8 (November 10, 2003). Surely, some nonnavigable tributaries have a significant nexus with navigable water, but this is a far cry from the conclusion that *any* nonnavigable tributary has such a significant nexus.

When it ultimately upheld the Corps' assertion that its "jurisdiction extends to *any* branch of a tributary system that *eventually flows* into a navigable body of water," 332 F.3d at 711 (emphasis added), the Fourth Circuit clearly found a "significant nexus" to be unnecessary. Thus, it erroneously upheld CWA jurisdiction where essentially "any" connection to navigable waters exists, even one that is extremely tenuous and remote.

This Court should grant the writ to rectify the Fourth Circuit's failure to follow *SWANCC*.

II. THE SCOPE OF THE CLEAN WATER ACT IS AN ISSUE OF GREAT NATIONAL IMPORTANCE.

A. The Fourth Circuit's Decision Will Have Broad Effects On The Implementation Of The Clean Water Act.

The Fourth Circuit's decision is of major significance because the term "navigable waters" governs the scope of several distinct regulatory programs under the CWA, including permitting under the National Pollutant Discharge Elimination System ("NPDES"), 33 U.S.C. § 1342; oil and hazardous substance spill prevention and liability provisions, 33 U.S.C. § 1321; and permitting for the discharge of dredged or fill material such as that at issue in the *Deaton* case, 33 U.S.C. § 1344(a). The term "navigable waters" also governs the scope of the Oil Pollution Act ("OPA"), and at least one circuit court has held that the term has the same meaning under both statutes. *Rice v. Harken Exploration Co.*, 250 F.3d 264, 267 (5th Cir. 2001).

The regulations implementing the CWA contain no less than 10 definitions of "navigable waters" and "waters of the United States." According to the *Advance Notice of Proposed Rulemaking on the Clean Water Act Regulatory Definition of "Waters of the United States,"* issued jointly by the Corps and the Environmental Protection Agency ("EPA"), "[c]ounterpart and substantively similar regulatory definitions appear at 40 CFR 110.1, 112.2, 116.3, 117.1, 122.2, 232.2, 300.5, part 300 App. E, 302.3 and 401.11." 68 Fed. Reg. 1991, 1994 (Jan. 15, 2003). Many of these definitions, including the Corps' definition under

section 404 of the CWA, are extremely broad and purport to regulate waters and wetlands with little or no connection to traditional navigable waters. The Fourth Circuit's decision may be taken by the agencies as an implied validation of such expansive regulatory definitions, notwithstanding this Court's ruling in *SWANCC*.

Moreover, the Fourth Circuit's decision has been afforded great deference by other circuits. In *United States v. Rapanos*, the Sixth Circuit found there to be a sufficient nexus between wetlands adjacent to a man-made drain and traditional navigable waters far removed (between eleven and twenty-one miles) from the man-made drain. *Rapanos*, 339 F.3d 447 (6th Cir. 2003). The Sixth Circuit found the Fourth Circuit's decision persuasive and relied upon the analysis of the Fourth Circuit in finding "an ample nexus to establish jurisdiction" under the CWA. *Id.* at 453.

In *United States v. Rueth Development Co.*, the Seventh Circuit affirmed penalties assessed by the EPA against the defendant for failure to obtain a permit before discharging dredged or fill material into wetlands that were adjacent to a ditch, which ultimately led to traditional navigable waters by way of another ditch. *Rueth*, 335 F.3d 598 (7th Cir. 2003). The Seventh Circuit indicated that the connection between nonnavigable waters and traditional navigable waters need only be slight to confer jurisdiction. *Id.* at 604. It relied on *Deaton* in determining that *SWANCC* did not affect the Corps' assertion of jurisdiction: "the Fourth Circuit upheld the Corps' exercise of adjacency jurisdiction over a parcel of land whose only connection to navigable waters was surface runoff that, after a 'winding, thirty-two-mile

path,' emptied into the Chesapeake Bay." *Id.* (quoting *Deaton*, 332 F.3d at 702).

In addition, the Fourth Circuit itself continues to rely on *Deaton* to uphold regulatory jurisdiction where nonnavigable waters are far removed from traditional navigable waters. *See Treacy v. Newdunn Associates, LLP*, 344 F.3d 407 (4th Cir. 2003).

Accordingly, the *Deaton* decision is having, and will continue to have, widespread influence upon the implementation of the CWA.

B. The Conflict Between The Fourth and Fifth Circuits Creates Substantial Confusion And Uncertainty For The Regulated Community.

The Fourth Circuit's decision conflicts with the Fifth Circuit's decision in *Rice v. Harken Exploration Co.* 250 F.3d 264 (5th Cir. 2001).[4] *See* Petition for Writ of Certiorari, *Deaton v. United States*, No. 03 - 701, at 10-14 (November 10, 2003). This conflict creates substantial confusion and uncertainty for the regulated community.

The petroleum and natural gas industry has thousands of facilities operating throughout the nation.

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[4] In fact, the Fifth Circuit recently affirmed that it is in conflict with the Fourth and Sixth Circuits in *United States v. Needham*. No. 02-30217, 2003 WL 22953383, at *3 (5th Cir. 2003). According to the Fifth Circuit, the expansive interpretation of navigable waters by the Fourth and Sixth Circuits is "unsustainable under *SWANCC*" and "the United States may not simply impose regulations over puddles, sewers, roadside ditches and the like." *Id.*

While many of those facilities are located near navigable waters or adjacent wetlands, many others are distant from any navigable waters or adjacent wetlands (although not necessarily without some highly tenuous connection to such waters or wetlands). Some companies have operations in many different states and regions. Corporate planning for compliance with the NPDES, oil spill prevention, and dredge and fill programs has become extremely complicated with the law's divergence among the circuits.

The difficulty is compounded by a lack of clear guidance from the responsible federal agencies. Congress and the President have delegated to the Corps and EPA authority to administer the regulatory programs under the CWA and the OPA. The Corps and EPA have attempted to issue clarifying guidance in light of this Court's decision in *SWANCC*. 68 Fed. Reg. 1991, 1995-1998 (Jan. 15, 2003). This "guidance" acknowledges that the lower courts are split in their interpretations of *SWANCC* and the question of CWA jurisdiction. *Id.* It notes that some courts have taken the same view as the Fourth Circuit, that CWA jurisdiction extends to the entire tributary system, while other courts have taken the view of the Fifth Circuit, that SWANCC interprets CWA jurisdiction less expansively. *Id.* It admits that there are "uncertainties" concerning jurisdiction under the CWA over some isolated, intrastate waters that are not navigable. *Id.* at 1996. It also states that the Corps and the EPA staff should, "generally speaking," assert jurisdiction over tributary systems of navigable waters. *Id.* at 1998. Ultimately, the guidance directs Corps and EPA staff to "make jurisdictional and permitting decisions on a case-by-case basis considering this

guidance, applicable regulations, and any additional relevant court decisions." *Id.*

Thus, not only does the split between the Fourth and Fifth Circuits create confusion by itself, the federal agencies responsible for implementing the CWA are unclear in their interpretations of CWA jurisdiction. Considering that there are ten EPA regions and eight Corps districts, petroleum and natural gas companies throughout the country are now subject to a multiplicity of interpretations of the CWA. The Court should grant the writ in order to eliminate the confusion and uncertainty that currently beset the regulated community.

C. The Fourth Circuit's Decision Poses Significant Economic Consequences For The Regulated Community.

Compliance with the permitting, planning, treatment, and other requirements of the various CWA programs is often very costly. Considering the Fourth Circuit's misreading of *SWANCC* and the resulting expansive interpretation of "navigable waters," any of thousands of facilities could find itself subject to extensive CWA regulation through a federal agency's creatively linking an abutting ditch, dry arroyo, excavation, or other topographic feature through a geographical chain that "eventually" leads to a navigable-in-fact water, regardless of the distance from the navigable-in-fact water or the lack of scientific support that actually demonstrates a potential effect on the navigable-in-fact water. This is especially a problem in the exploration and production segment of the petroleum industry, in which many operations are located in arid, desert or desert-like climates, such as in west Texas or

New Mexico, where the possibility that a remote ditch will affect a navigable-in-fact water can be extremely attenuated.

Thus, the Fourth Circuit's decision poses significant, detrimental economic consequences for industry that are not justified by the purported benefits to be gained.

CONCLUSION

The decision of the Fourth Circuit conflicts with this Court's decision in *SWANCC*, thereby opening the door to substantial overreaching by the Corps and EPA in the implementation of the CWA. Because of this, and because the scope of the CWA is an issue of great national importance, the Court should grant the writ.

January 30, 2004

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Nos. 03-637, 03-701 & 03-929

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In The
Supreme Court of the United States

NEWDUNN ASSOCIATES, LLP, et al., *Petitioners,*

v.

UNITED STATES ARMY CORPS OF ENGINEERS, *Respondent.*

JAMES S. and REBECCA DEATON, *Petitioners,*

v.

UNITED STATES OF AMERICA, *Respondent.*

JOHN A. RAPANOS, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

On Petition For Writs Of Certiorari To The United States Court Of Appeals For The Fourth And Sixth Circuits

BRIEF FOR *AMICI CURIAE* NATIONAL ASSOCIATION OF FLOOD AND STORMWATER MANAGEMENT AGENCIES, FLORIDA STORMWATER ASSOCIATION, FLORIDA ASSOCIATION OF SPECIAL DISTRICTS, SOUTH FLORIDA WATER MANAGEMENT DISTRICT AND CITY OF CLEWISTON IN SUPPORT OF THE PETITION FOR WRITS OF CERTIORARI

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QUESTION PRESENTED

The courts of appeals are deeply divided over the meaning of "navigable waters" and the principles enunciated in *Solid Waste Agency of Northern Cook County* v. *United States Corps of Engineers*, 53 U.S. 159 (2001). What constitutes a "navigable water" determines the scope of federal regulatory jurisdiction and, thus, delineates federal and state roles in protection of the nation's waters under the Clean Water Act, the Oil Pollution Act and other significant federal legislation. *Amici curiae* – various state agencies, local governments and others involved in water resource management – believe it is of critical national importance for the Court to clarify which principles properly define what is and is not a "navigable water" through the following question presented:

Whether federal jurisdiction over "navigable waters" extends to all waters that have any hydrologic connection with a navigable-in-fact water body, regardless of proximity and no matter how indirect, intermittent or ephemeral their connections may be?

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INTEREST OF THE *AMICI CURIAE*

Amici curiae[1] – National Association of Flood and Stormwater Management Agencies, Florida Association of Special Districts, Florida Stormwater Association, South Florida Water Management District, and City of Clewiston – submit this brief to encourage granting the Petitions for Writs of Certiorari in *United States* v. *Deaton*, Case No. 03-701; *Newdunn* v. *United States Army Corps of Engineeers*, Case No. 03-637; and *Rapanos* v. *United States*, Case No. 03-929.

Amici include state agencies, local governments and a consortia of cities and local water management groups all with a strong interest in the clear and consistent interpretation of "navigable waters" – the term of art used to establish the geographic scope of federal jurisdiction under several significant federal regulatory programs, including the Clean Water Act and the Oil Protection Act. *Amici* are concerned with the reasonable and uniform application of those programs, which create distinct regulatory roles for the federal, state and local governments in the preservation and protection of all waters.

NAFSMA, established in 1979, represents more than 100 local and state flood control and stormwater management agencies. Its members are public agencies that protect lives, property and economic activity from storm and flood waters. NAFSMA is also focused upon the improvement of the health and quality of our nation's

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[1] This brief is being filed concurrently with the written consents of all parties. Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *amici curiae*, their members, or their counsel, made a monetary contribution to the preparation and submission of this brief.

waters. Its mission is to advocate public policy, encourage technologies and conduct education programs to facilitate and enhance its member's public service.

Florida Association of Special Districts is an association representing 89 special districts in the State of Florida, including 39 of the State's drainage districts. A large portion of the activities of drainage districts is the construction, operation and management of structures which control the movement of waters within their jurisdictions.

The Florida Stormwater Association (FSA) is a non-profit organization with almost 200 member cities and counties, water management districts, engineering firms, and others interested in surface water quality. FSA is an active participant in the development of stormwater management policy and works to create solutions to stormwater management problems that can be implemented by local governments. It provides training and education, information sharing and advocacy relating to water issues.

The South Florida Water Management District (SFWMD) is one of five water management districts with stewardship over Florida's public water resources. §§ 373.069 & 373.016, Fla. Stat. The District establishes and implements the State's water policies from Orlando to Key West. §§ 373.069(2)(e), 373.073 & 373.016, Fla. Stat. It operates a comprehensive water management system of levees, canals and flow diversion facilities designed to control and allocate the waters throughout the watersheds within its jurisdiction for flood control, water supply, and environmental purposes.

The City of Clewiston is a municipal corporation located in South Florida that has approximately 6,500 residents.

The *Amici,* their members and similar agencies nationwide are responsible for innumerable public works which today manage surface waters to provide flood control, water supply and protection for the natural systems. These public works are often subject to a variety of federal programs, including construction permits under the Corps § 404 dredge and fill program; Municipal Separate Storm Sewer Systems under § 402(p); and other National Pollutant Discharge Elimination System permits under § 402. Whether these federal regulatory programs apply to any given activity or facility depends, in large part, upon whether the waters involved are characterized as "navigable" or not. Congress left the remainder of the task of preventing water pollution to the States, with federal guidance, assistance, and oversight. See THE CLEAN WATER HANDBOOK 191-220 (M. Ryan ed. 2003).

Congress took seriously this division of responsibility between the federal government and the States, reflecting its intent to maintain States' traditional powers over water allocation and water and land use. See 33 U.S.C. § 1251(b) & (g). As this Court recently observed, the Clean Water Act must be interpreted with Congress's intent to maintain the federal-state balance of powers firmly in mind. *Solid Waste Agency of Northern Cook County* v. *United States Army Corps of Engineers*, 531 U.S. 159, 166-167, 173 (2001) (*SWANCC*).

Amici are also concerned that expanding federal CWA requirements to many areas far outside traditional navigable waters would mandate costly, time-consuming, and

burdensome bureaucratic proceedings, exposing water agencies to huge penalties for past violations, and interfering with the States' own highly developed pollution programs – consequences never intended by Congress.

For these and other reasons explained below, *Amici* urge the Court to clarify the principles enunciated in *SWANCC* and the proper scope of "navigable waters" while maintaining the proper federal and state balance in our partnership to restore and protect all of the nation's waters.

ARGUMENT

I. THE COURTS OF APPEALS ARE DEEPLY DIVIDED OVER THE REACH OF "NAVIGABLE WATERS" AND SCOPE OF FEDERAL REGULATIONS BASED THEREON.

The term "navigable waters" has been used by Congress for well over a century to define the reach of federal jurisdiction under several critical regulatory programs. Today it appears 215 times in the United States Code and 735 more times in the Code of Federal Regulations. Nonetheless, a definitive reliable test to determine what constitutes "navigable waters" remains strikingly elusive. The principles laid down by this Court in *SWANCC* to guide such determinations have instead become the subject of deep conflict among courts of appeals.

In *SWANCC*, the Court interpreted "navigable waters" to include waters with a "significant nexus" to a navigable-in-fact water body. 531 U.S. 159 (2001). Rejecting the United State's position, the Court explained that "In order to rule for [the government] . . . we would have to hold that

the jurisdiction of the Corps extends to ponds that are *not* adjacent to open water." Ibid. at 168 (emphasis original). Importantly for *Amici*, the Court recognized that "permitting [the Corps] to claim federal jurisdiction over ponds and mudflats would result in a significant impingement of the States' traditional and primary power over land and water use." Ibid. at 174.

Since *SWANCC*, the courts continue to differ over what constitutes a "nexus" significant enough to transfer jurisdiction over water use from state to federal regulators. Some courts apply a narrow test that requires waters to be "adjacent" to open waters to be considered navigable, while others accept *any* hydrologic connection as sufficient.

In the instant cases, the Fourth and Sixth Circuits found a "significant nexus" in slight, indirect, intermittent and arguably hypothetical hydrologic connections. For example, in *Deaton* the Fourth Circuit found federal jurisdiction over a roadside ditch located eight miles from a navigable-in-fact water. Similarly, the Fourth Circuit in *Newdunn* upheld the exercise of federal jurisdiction over waters found to be "remote" from navigable waters to which they were connected only by intermittent surface waters. In *Rapanos*, the Sixth Circuit again found jurisdiction over wetlands that were admittedly not themselves adjacent to navigable waters. Thus, these cases involve lands located significant distances from any traditionally navigable waters and with the most tenuous of hydrologic connections to them.

The Fifth Circuit has squarely rejected the Fourth and Sixth Circuit's proposition in these cases that any hydrologic connection creates a "significant nexus" to

navigable waters. In *Rice* v. *Harken Exploration Co.*, the court of appeals interpreted *SWANCC* to mean that "a body of water is [navigable] only if it is actually navigable or is adjacent to an open body of navigable water." 250 F.3d 264, 270 (5th Cir. 2001). More recently and pointedly, in *In re*: *Needham*, ___ F.3d ___, 57 ERC 1673 (5th Cir. 2003), the Fifth Circuit flatly stated that the Fourth and Sixth Circuit's view is "unsustainable under *SWANCC*," solidifying its position that a "significant nexus" requires not merely a remote hydrologic connection, but also some reasonable proximity. This conflict, expressly noted in *Needham*, is clear, deep and irreconcilable.

II. IT IS OF CRITICAL NATIONAL IMPORTANCE TO STATE AND LOCAL WATER MANAGERS FOR THIS COURT TO RESOLVE THE CONFLICT BELOW AND CLARIFY THE MEANING OF "NAVIGABLE WATERS."

The inter-circuit conflict over the question presented should be immediately resolved by this Court for several reasons.

1. The Court cannot expect the federal agencies to provide sufficient guidance to overcome this split among the courts of appeals. To the contrary, EPA and the Corps recently abandoned previously announced plans to address CWA jurisdiction and the principles enunciated in *SWANCC* through rulemaking, plainly leaving this conflict to be resolved by the Court. EPA, APPELLATE DECISIONS MAY RETURN WATER ACT BATTLE TO HIGH COURT, INSIDE EPA Vol. 24, No. 51 (Dec. 19, 2003). Continued percolation of this issue will simply add to the confusion and burdens described below.

2. Whatever the result, the *Amici* deserve clarity and uniformity in how the federal laws are applied. Water managers and local governments should not be subjected to different federal permitting depending upon which judicial circuit they operate. As it stands, the rights of *amici* improperly vary from circuit to circuit and remain increasingly uncertain in those circuits that have not decisively addressed the question presented here.

3. The almost limitless interpretation of "navigable waters" adopted in *Deaton*, *Newdunn* and *Rapanos* most certainly shifts the federal-state balance struck in the Clean Water Act. Virtually all water management and drainage districts, counties and cities traditionally use canals, ditches, culverts, gutters and other drainage works to manage surface waters. Where these are all considered "navigable waters" simply because waters from them *may* "eventually flow" to a water body that is actually navigable-in-fact, any distinction intended by the term "navigable" is lost.

As the scope of "navigable waters" expands, several Clean Water Act permitting programs become even more extensively applied to traditionally local water management activities. As the Deatons correctly point out, the present conflict obscures and confuses what is national and what is local. *Deaton* Br. 22. Congress should not lightly be assumed to have intended such a result. In fact, the Act should not be read so broadly absent a clear statement that Congress intended to so transform the balance of federal and state rights and responsibilities.

4. On a practical level, significant regulatory burdens, costs and delays will be added to important public works with the expansion of federal permitting. Where there is

no evidence of the waters actually reaching or harming any navigable water, these burdens are added for no identifiable environmental benefit. Moreover, programs such as the National Pollutant Discharge Elimination System lack the flexibility necessary to accommodate local concerns and will supplant local decision making and programs designed to allow systemic planning. State and local government resources remain increasingly hard pressed to handle growing urban, agricultural and natural systems needs. Additional burdens should neither be ignored nor so easily extended.

5. Finally, confusion among the courts of appeals creates heightened problems where as here, the federal regulatory scheme brings with it not only fines but the potential for criminal penalties including jail. See *Rapanos*. Given the conflicts amongst the courts of appeals, *Amici* increasingly risk unanticipated and unpredictable liabilities.

CONCLUSION

There are few issues more critical to state and local water managers, including counties, municipalities, flood control and drainage districts, and stormwater utilities than the need to clearly understand the scope and reach of the many federal regulatory programs under which they operate. The conflict among the Circuits has created confusion and uncertainty and should now be resolved by this Court.

The *Amici* therefore urge this Court to accept the petitions and resolve the question presented.

Respectfully submitted,

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No. 03-701

Supreme Court, U.S.
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In The

Supreme Court of the United States

JAMES S. and REBECCA DEATON,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF *AMICI CURIAE* OF THE HOME BUILDERS ASSOCIATION OF CENTRAL ARIZONA SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether a roadside ditch fronting the Deaton's 12-acre property is a "navigable water" such that the Deatons violated the federal Clean Water Act by not obtaining a permit from the United States Army Corps of Engineers before placing dirt in a wetland adjacent to the ditch.

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I. INTEREST OF THE *AMICUS CURIAE*[1]

The Home Builders Association of Central Arizona (HBACA) is a non-profit corporation organized under the laws of the State of Arizona, formed in 1951 to provide a means for businesses in the housing and real estate industries in central Arizona to address issues and concerns relating to those industries. Under its association with the National Home Builders Association, HBACA is authorized to represent constituent members in the Arizona counties of Maricopa, Pinal, Apache, Navajo, Gila, Graham, Greenlee, Cochise, Yavapai, Yuma and La Paz. This represents a vast territory within Arizona, and very diverse conditions relating to the availability of water, the topography of natural drainage, the types of artificial and man-made drainage, and the definition of "waters of the United States."

Our members are heavily regulated under the Clean Water Act[2] and therefore are directly affected by court decisions such as the instant case. The Clean Water Act establishes two regulatory permitting programs for discharges to "navigable waters" that govern activities of our members. Section 404 requires a permit for the discharge of dredged or fill material and is administered by the U.S.

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[1] Pursuant to Rule 37.6, Rules of the Supreme Court, counsel for *amicus curiae* Home Builders Association of Central Arizona state that they authored this brief in whole. No person or entity other than *amicus curiae* has made a monetary contribution for preparation or submission of this brief.

[2] Also known as the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1387.

Army Corps of Engineers (Corps), with oversight by the U.S. Environmental Protection Agency (EPA). Section 402, also called the National Pollutant Discharge Elimination System (NPDES) program, requires a permit for discharge of pollutants (other than dredged or fill material) and is administered by EPA. 33 U.S.C. § 1344; *id.*, § 1342. Under the statute, the term "navigable waters" is defined as "waters of the United States" which is in turn expansively defined by regulation to include all traditional navigable waters, tributaries and impoundments.[3] The tributary rule, at issue here, is the most expansive part of the current regulatory definition. It provides that a tributary of a traditional navigable water is in itself a "navigable water" under the Act and includes not just direct (or primary) tributaries but all secondary, tertiary and higher order tributaries to the limit of the tributary system.[4]

Because of this expansive definition, particularly through the application of the tributary rule, even the smallest ephemeral drainages and ditches are considered "waters of the United States" because they drain to larger waters that eventually drain into the sole traditional navigable water in Arizona, the Colorado River.[5] The Administrative appeal decisions of the Corps of Engineers South Pacific Division, which includes Arizona, illustrate the broad jurisdictional reach of the term "navigable

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[3] 33 U.S.C. § 1362(7); 33 C.F.R. § 328.3(a).

[4] 42 Fed. Reg. 37122, 37144 (July 19, 1977).

[5] Almost the entire State of Arizona lies within the Colorado River Basin. *See Arizona v. California*, 373 U.S. 546, 83 S.Ct. 1468 (1963).

waters" as currently applied in Arizona.[6] In one case, the Corps asserted jurisdiction over a desert wash in Buckeye, Arizona, 2400 feet from its point of origin below a regional flood control structure. *See* U.S. Army Corps of Engineers South Pacific Division Administrative Appeal Decision, *Approved Jurisdictional Determination for Desert Moon Shadows Estates*, 2 (July 11, 2002). The basis for the delineation was in part that the wash eventually connected to an irrigation canal, which was tributary to the Hassayampa River, which the parties agreed was subject to Corps' jurisdiction. *Id.*

In another instance, the Corps asserted jurisdiction over a desert wash across private property in Tucson, based on the wash's connection through a series of downstream washes to the Rillito River, a tributary to the Santa Cruz River, which is tributary to the Gila River, which is in turn tributary to the Colorado River. The delineation included a one foot wide channel as jurisdictional. *Id.*, *Approved Jurisdictional Determination for the Sunrise Office Park*, 3 (September 7, 2001).[7] In a third example, the Corps delineated a cattle stock water tank based on a historic connection that no longer existed. In Arizona, stock tanks are typically constructed in low areas of natural drainage to capture runoff. As such, they would be considered "impoundments" of a tributary of a navigable

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[6] The appeals are conducted pursuant to 33 C.F.R. Part 331. Decisions are published at the Corps' South Pacific Division website at http://www.spd.usace.army.mil/cwpm/public/ops/regulatory/adminAppeals/index.htm. The decisions themselves do not have precedential effect and are being cited here only for illustrative purposes. 33 C.F.R. § 331.7(g).

[7] Published at the Corps South Pacific Division website at: http://www.spd.usace.army.mil/cwpm/public/ops/regulatory/adminAppeals/index.htm.

water, making the tank itself, under current Corps' policy, a navigable water regulated under the Act. *See id.*, *Approved Geographic Jurisdiction of the Valley Vista Property* 2-3 (January 31, 2003).[8]

In Arizona, land development often involves grading and rerouting of natural and man-made drainages that the Corps and EPA consider "waters of the United States." Reshaping of these drainage areas typically results in discharges of fill material requiring a permit under Section 404 of the Clean Water Act. The permit process imposes substantial burdens. Under EPA Guidelines, all discharges to waters of the United States must be avoided to the extent practicable. Discharges that are permitted must be mitigated to replace lost "functions and values" of the impacted waters and to ensure "no net loss" of such waters. The permit process is expensive and time-consuming.

Similarly, discharge of storm water from construction sites to waters of the United States requires a permit under Section 402 of the Clean Water Act, also known as the "National Pollutant Discharge Elimination System" or "NPDES" program. The State of Arizona has established statutory authority to administer the Arizona Pollution Discharge Elimination System (AZPDES) program[9] and this program and has received EPA-approval and so operates in lieu of the federal program. The scope and geographic reach of the program is the same as its federal

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[8] The appeal decision rejected the pre-Clean Water Act tributary connection as a basis for jurisdiction and remanded to the Corps for further action. There was no question that if the tributary connection existed, that the tank would be considered a "navigable water." *Id.* at 4.

[9] ARIZ. REV. STAT. ANN. § 49-255.01 (2003).

counterpart. The goal of the program is to control pollutants generated by construction sites and prevent them from reaching navigable waters. It is equally critical to determine the geographic scope of waters of the United States in this context because our members are required to develop storm water best management practices to control pollutants *before* they reach the regulated waters.

Aside from construction issues, HBACA is also uniquely interested in the social policy of affordable housing in the State of Arizona. The ability to construct housing in a cost effective manner increases the market, which is in the interest of the home building industry, but HBACA's interest goes beyond that.

At the retail homebuyer level, HBACA is closer to the issue of affordability than most governmental agencies. Too often, when issues of growth and development are being discussed at the policy level, the need for affordable housing is overlooked. Policy level decision-makers are not typically affected by lack of affordable housing. Yet these policy decisions directly affect housing affordability.

Any law that affects the cost of housing in Arizona affects HBACA. The definition of waters of the United States at issue in this case is such a law.

II. REASONS FOR GRANTING THE PETITION FOR CERTIORARI AND SUMMARY OF THE ARGUMENT

A. The Interpretation of "Waters of the United States" Has a Direct Effect on the Affordable Housing in Arizona

In Arizona, the question of affordable housing has raised sufficient concern at the state level to create the

Arizona Department of Housing[10] and the Arizona Housing Commission.[11] Jointly, these entities have undertaken to study affordable housing issues in Arizona and prepare a report on the subject. The report, entitled *Affordable Housing Profile*, studies the affordable housing "gap" between Arizona households seeking housing and the number of available units.[12] It describes this concept as follows:

> One of the primary objectives of this study is to identify the "affordability gap" for the State. The "gap" is the difference between the number of households within each income range and the number of housing units affordable to those households. It typically occurs at the lower end of the income range where there are more households than affordable units. For these households to find housing in the community, they must pay more than

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[10] The Arizona Department of Housing was created in 2001 and became operational on October 1, 2002. 2001 ARIZ. SESS. LAWS Ch. 22, §§ 18, 22. It is an agency of the State of Arizona, authorized by statute to "address the affordable housing issues confronting this state. . . . " ARIZ. REV. STAT. ANN. § 41-3953(A) (2003). The agency's official website is http://www.housingaz.com.

[11] The Arizona Housing Commission is an advisory commission also created by Arizona to "recommend housing strategic planning and policy." ARIZ. REV. STAT. ANN. § 41-3954(B)(1). The members include rural and non-rural representatives, one member of a tribal government, one member of a tribal housing department, and various other interests groups. *See id.*, § 41-3954(A).

[12] Arizona Housing Commission, Arizona Department of Housing, *Arizona Affordable Housing Profile, Findings and Conclusions* (2002). The report is available on the Arizona Department of Housing website. *See* note 10, *ante*. The report notes that "Arizona is the first state to commission a profile of this kind." *Id.* at p. i.

> 28% of their income toward shelter or live in sub-standard and/or over-crowded conditions.[13]

The report summarizes that, as of 2000, the total affordability gap for the State of Arizona "is estimated at 194,700 households or about 10.3 percent of all households including those on Native American reservations. . . . [C]ertain counties, such as Coconino, Santa Cruz and Yavapai, have affordability gaps higher than 15%."[14]

Importantly, the report also concludes:

> Each community's housing needs are different and individual solutions and strategies must be tailored to the particular situation.[15]

This element of affordable housing – local community differences and the need for local solutions – relates directly to the need for clarification of federal regulatory control over land use planning at the local level.

In examining the cost of housing in Arizona, the Arizona Housing Commission also prepared a report entitled *The State of Housing in Arizona*.[16] This report focuses on the reasons for high housing costs and the concomitant lack of affordable housing. It identifies six factors contributing to the price of a home: Construction material and labor (50-55%); land acquisition and site

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[13] *Id.* at 1.

[14] *Id.*

[15] *Id.* at 2.

[16] Arizona Housing Commission, *The State of Housing in Arizona* (2000). This report is available on the State of Arizona Department of Housing web page, http://www.housingaz.com/hc/default.asp.

improvement costs (20-24%), builder overhead (12-14%), government fees (8-10%), builder profit (3-5%), and city, county and state sales taxes (3%).[17]

Significantly, "the most frequently mentioned barrier to affordability within the construction process was the limited amount of land for private development."[18] The report notes that, while almost half of the land in the State of California is privately held, only 17% of the land in Arizona is in private hands. The remainder is in public ownership.[19] As to this issue of lack of land, the report concludes that the influence of government on this barrier to housing affordability is "pervasive," ranging from public land policies and open space requirements to zoning and taxation.[20]

In Arizona, restrictions on the use of land are particularly acute. These restrictions translate into increased housing costs. It is an issue of local concern, and it demonstrates the wisdom of Congress in limiting the reach of federal land use planning to issues of truly national concern. As discussed in the next section, interpretation of the Clean Water Act should preserve the ability to deal with issues of local concern at the state and community level.

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[17] *Id.* at 32-33.

[18] *Id.* at 37.

[19] 27% is held in Indian reservation status. The Federal Government owns an additional 42%, administered by the Bureau of Land Management, the Bureau of Reclamation, the National Park Service, the National Forest Service and other federal agencies. The State of Arizona owns 14%. *Id.* at 18.

[20] *Id.* at 37.

B. The Reach of the Federal Clean Water Act, Even as it is Delegated to the States, Should be Limited

As noted in *United States v. Morrison*, 529 U.S. 598, 617-18, 120 S.Ct. 1740, 1754 (2000), "[t]he Constitution requires a distinction between what is truly national and what is truly local." These words speak well to the issue of defining "waters of the United States" in terms that extend the reach of the federal permitting programs under the Clean Water Act. Permitting at the federal level is cumbersome, expensive and time consuming. It is necessary when national issues are at stake, but it is inappropriate when federal permitting requirements operate to displace local authority, and responsibility, for insuring the local welfare.

In this case, the United States Army Corps of Engineers has asserted jurisdiction over a wetland on private property because the wetland is adjacent to a drainage ditch deemed to be within the definition of "waters of the United States." The United States Court of Appeals for the Fourth Circuit has affirmed this jurisdictional authority, fundamentally on the principle that water finding its way into the drainage ditch will "eventually flow" into waters that are undeniably waters of the United States.[21] Because of this eventual flow, the ditch itself becomes subject to the Clean Water Act.

This definitional rule should not pass constitutional scrutiny under *Morrison, supra*, because it knows no bounds between issues of national or local concern. As has been pointed out in the briefs filed to date in support of issuing a writ of certiorari, every gutter, curb, and storm

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[21] *United States v. Deaton*, 332 F.3d 698 (4th Cir. 2003).

drain in the United States arguably meets this test. In Arizona, every small ephemeral wash, stock tank and irrigation drainage ditch will likely meet this test, and there are a great many small ephemeral washes, stock tanks and irrigation drainage ditches in Arizona that will, in turn, affect the affordability of housing through pervasive, and unnecessary, federal involvement.

For the reasons discussed in the next section, the rule adopted by the Court of Appeals for the Fourth Circuit is legally erroneous and should be reversed. A more moderate approach to federal land use control should be adopted.

III. ARGUMENT: THE *DEATON* TRIBUTARY RULE IMPROPERLY EXTENDS JURISDICTION OVER DRAINAGE FEATURES THAT LACK A SIGNIFICANT NEXUS TO NAVIGABLE WATERS

A. The *Deaton* Tributary Rule is Based on the Theory that Congress Intended to Regulate to the Limits of its Authority Under the Commerce Clause

Prior to *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* ("*SWANCC*"),[22] the general view of EPA and the Corps regarding the scope of their jurisdiction under the Clean Water Act was that, by leaving out the word "navigable," Congress intended to regulate all waters that could be reached through Congress' plenary authority over interstate commerce. *See Natural Resources Defense Council v.*

[22] 531 U.S. 159, 121 S.Ct. 675 (2001).

Callaway (*NRDC*).[23] This view was unequivocally rejected by this Court in *SWANCC:* "We cannot agree that Congress' separate definitional use of the phrase "waters of the United States" constitutes a basis for reading the term "navigable waters" out of the statute. . . . .The term "navigable" has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made."[24] Yet the tributary rule as now promulgated continues to rest on the faulty presumption of this expansive jurisdiction.

Soon after the adoption of the Clean Water Act in 1972, EPA began developing regulations to define "waters of the United States." EPA's General Counsel viewed the deletion of the word "navigable" from the definition of "waters of the United States" as "significant":

> The [legislative history] indicates that the new definition of "navigable waters" is to "be given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes."[25]

Counsel then opined on the types of waters that would be regulated and included both navigable waters and tributaries of navigable waters in the list.[26] Later that

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[23] 392 F. Supp. 685, 686 (D.D.C. 1975).

[24] 531 U.S. at 172.

[25] EPA General Counsel Opinion (Feb. 6, 1973), *quoting* S. Rept. No. 92-1236 at 144.

[26] *Id.*

same year, EPA issued its regulations defining "waters of the United States" and, in apparent reliance on the counsel's opinion, included "[t]ributaries of navigable waters of the United States" as a category of jurisdictional waters.[27]

In its initial rulemakings, the Corps defined "navigable waters of the United States" in its regulations without reference to tributaries.[28] The 1974 revisions to the definition of "navigable waters" more fully addressed the Clean Water Act amendments, but still made no reference to tributaries.[29] This interpretation was challenged in *NRDC, supra.* In *NRDC*, the court held that Congress intended to assert "federal jurisdiction over the nation's waters to the maximum extent permissible under the Commerce Clause of the Constitution" and that the term "navigable waters" was "not limited to the traditional tests of navigability."[30] The court therefore held that the Corps' limited exercise of jurisdiction was unlawful.

Within weeks of the *Callaway* decision, the Corps' proposed regulations on how to define "waters of the United States."[31] The Corps proposed two basic alternatives for regulating tributaries. The first would regulate "all navigable waters up to their headwaters and all tributaries of navigable waters up to their headwaters." The second, less expansive definition (and the one favored by the Corps) would regulate all navigable waters up to

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[27] 38 Fed. Reg. 13528, 13529 (May 22, 1973).

[28] *See* 37 Fed. Reg. 18289 (Sept. 9, 1972).

[29] 39 Fed. Reg. 12115 (April 3, 1974).

[30] 392 F. Supp. at 686.

[31] 40 Fed. Reg. 19766 (May 6, 1975).

their headwaters and all "primary" tributaries of such waters up to their headwaters.[32] By July of 1975, the Corps' published "interim final regulations" that selected the broadest possible regulatory approach to tributaries. In this rule, navigable waters were defined to include "All tributaries of navigable waters of the United States up to their headwaters and landward to their ordinary high water mark."[33] The preamble stated that "[w]ith respect to the inland areas of the country, Corps jurisdiction under Section 404 of the FWPCA would extend to . . . all tributaries (primary, secondary, tertiary, etc.) of navigable waters of the United States." The Corps' 1977 final regulations modified this definition of tributaries to exclude the headwater requirement.[34]

In 1978, keeping with this theme of ever-expanding regulation, EPA published proposed revisions to its definition of waters of the United States that would have broadened the 1973 definition to include additional waters.[35] The change was proposed "to more accurately reflect which waters are subject to the requirements of the Clean Water Act. Consistent with legislative history, judicial interpretations, and longstanding EPA policy, the term covers all waters which may be regulated by the Federal

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[32] 40 Fed. Reg., *supra*, at 19767.

[33] 40 Fed. Reg. 31320, 31323-24 (July 25, 1975).

[34] 42 Fed. Reg. 37122, 37144 (July 19, 1977).

[35] 43 Fed. Reg. 37078 (August 21, 1978).

Government within constitutional limits. . . ."[36] In 1982, the Corps' regulations were brought in line with EPA's.[37]

B. The Current Rule Impermissibly Continues to Regulate All Tributaries, Regardless of their Relationship to Downstream Navigable Waters

The blanket nature of the current tributary rule mirrors the now-discarded migratory bird rule that was at issue in *SWANCC*.[38] Like the tributary rule, the migratory bird rule was developed as a way to broadly identify any and all waters that Congress could conceivably regulate under its interstate commerce authority, regardless of navigability. Like the migratory bird rule, the tributary rule reaches too far.

First, there is no definition of "tributary" in the rules. Courts have been left to develop their own *ad hoc* definitions, of which *Deaton* is the latest. *See Headwaters, Inc. v. Talent Irrigation Dist.*[39] (quoting the dictionary definition of tributary as "a stream which contributes its flow to a larger stream or other body of water.") *Headwaters* and *Deaton* proceed from the assumption that blanket regulation of tributaries is permissible, and the only question is whether the drainage feature at issue is in fact a tributary. Yet the presumption itself – that all tributaries of navigable

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[36] *Id.* at 37079. *See also* 44 Fed. Reg. 32854, 32901 (June 7, 1979) (revised definition).

[37] 33 C.F.R. § 323.3(a)(5) (1982).

[38] 531 U.S. 163-164 (discussion of migratory bird rule).

[39] 243 F.3d 526, 533 (9th Cir. 2001).

waters, no matter how far removed, can be regulated – does not pass the "significant nexus" test of *SWANCC*.

Arizona has a single traditional navigable water, the Colorado River. All other waters in the state are regulated in some fashion through application of the tributary rule. Because there is no clear definition of when a "tributary" begins or ends, there is no limit to the reach of the Clean Water Act based on a federal nexus. The reach of the Clean Water Act, in the agency view, extends to the smallest ephemeral washes and roadside ditches. Furthermore, since "impoundments" of tributaries are in themselves jurisdictional waters, even stock tanks are covered.[40] This breadth and the lack of any functional definition of "tributary" makes the rule, like the migratory bird rule, a path to unlimited federal regulation. As such, it oversteps the same bounds exceeded by the migratory bird rule at issue in *SWANCC*.

C. Pollution Emanating from Ditches can be Controlled Without the Application of the Tributary Rule

The reason for asserting jurisdiction over non-navigable tributaries, and in fact the only reason plausible under *SWANCC*, is the need to "control pollutants at the source." *See, e.g., United States v. Ashland Oil & Transp. Co.*, 504 F.2d 1317, 1326 (6th Cir. 1974) ("It would, of course, make a mockery of those powers if its authority to

[40] *See* U.S. Army Corps of Engineers South Pacific Division Administrative Appeal Decision, *Approved Jurisdictional Determination for The Valley Vista Property* (January 31, 2003).

control pollution was limited to the bed of the navigable stream itself. The tributaries which join to form the river could then be used as open sewers as far as federal regulation was concerned. The navigable part of the river could become a mere conduit for upstream waste."); *Puerto Rico v. Alexander*, 438 F. Supp. 90 (D.D.C. 1977); *United States v. Holland*, 373 F. Supp. 665, 673 (M.D. Fla. 1974). Yet in today's regulatory climate, discharge of pollutants through drainage ditches would be regulated regardless of the status of the ditches themselves.

Of critical importance is the Clean Water Act itself, which regulates the discharge of pollutants from "point sources" to waters of the United States. Expansive case law developed under the NPDES program clearly upholds the determination that a ditch, if it serves as a conduit for discharging pollutants into downstream waters, is considered a "point source." As such, the discharges are regulated under the NPDES program.

With regard to our homebuilding industry, for example, EPA also considers construction sites to be "point sources." Discharges leaving these sites that enter navigable waters are regulated under the Section 402 program.[41]

Moreover, dumping wastes on the ground *anywhere* is generally regulated under a host of federal, state and local regulations. In Arizona, a person who "discharges" is required to obtain an Aquifer Protection Permit (APP)

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[41] *See Sierra Club v. Abston Construction*, 620 F.2d 41, 45 (5th Cir. 1980) (graded land can be a point source); *see also* 55 Fed. Reg. 47990, 47997 (Nov. 16, 1990) (preamble to EPA storm water rule explaining broad reach of "point source").

from the Arizona Department of Environmental Quality (ADEQ).[42] "Discharge" is defined as the direct or indirect addition of a pollutant to waters of the state from a facility."[43] For the APP program, the term is further defined as the "addition of a pollutant from a facility either directly to an aquifer or to the land surface or the vadose zone in such a manner that there is a reasonable probability that the pollutant will reach an aquifer."[44]

The kind of pollution sought to be controlled by regulating a ditch as "waters of the United States" under the Clean Water Act is directly regulated by the State. Further, other types of polluting activities are also heavily regulated. For example, open dumping is generally prohibited under the Resource Conservation and Recovery Act (RCRA)[45] as well as by state and local solid waste regulation. Therefore, the premise that an expansive tributary rule is needed to control pollutants at the source is faulty.

IV. CONCLUSION

If tributary can be defined so broadly as to include the Deaton's drainage ditch, it might also be defined so broadly that virtually every parcel of private land in the State of Arizona will be classified as having a wash, a stock tank or an irrigation drainage ditch that is "tributary" to the Colorado River, a navigable stream. This type of micro-regulation of land use planning at the federal

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[42] ARIZ. REV. STAT. § 49-241(A).

[43] ARIZ. REV. STAT. ANN. § 49-201.12.

[44] *Id.*

[45] 42 U.S.C. §§ 6901-6992k.

level is unnecessary and inconsistent with the limitations Congress intended on the Clean Water Act as defined by this Court in the *SWANCC* decision.

This over regulation of land use by the federal agencies is having a direct impact on the affordability of housing in Arizona, where only 17% of the state's land base is in private ownership. On behalf of the home building industry in Arizona, HBACA asks this Court to issue a writ of certiorari and accept jurisdiction of this cause to reverse the decision of the Court of Appeals for the Fourth Circuit.

Respectfully submitted this 30th day of January, 2004.

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